JUDGMENT

PART I

Preliminary Question of Law.

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

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THE UNITED STATES OF AMERICA, THE REPUBLIC OF CHINA, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE UNION OF SOVIET SOCIALIST REPUBLICS, THE COMMONWEALTH OF AUSTRALIA, CANADA, THE REPUBLIC OF FRANCE, THE KINGDOM OF THE NETHERLANDS, NEW ZEALAND, INDIA AND THE COMMONWEALTH OF THE PHILIPPINES.

- AGAINST -

ARAKI, Sadao; DOHIHARA, Kenji; HASHIMOTO, Kingoro; HATA, Shunroku; HIRANUMA, Kiichiro; HIROTA, Koki; HOSHINO, Naoki; ITAGAKI, Seishiro; KAYA, Okinori; KIDO, Koichi; KIMURA, Heitaro; KOISO, Kuniaki; MATSUI, Iwane; MINAMI, Jiro; MUTO, Akira; OKA, Takasumi; OSHIMA, Hiroshi; SATO, Kenryo; SHIGEMITSU, Mamoru; SHIMADA, Shigetaro; SHIRATORI, Toshio; SUZUKI, Teiichi; TOGO, Shigenori; TOJO, Hideki; UMEZU, Yoshijiro.

Defendants.

I sincerely regret my inability to concur in the judgment and decision of my learned brothers. Having regard to the gravity of the case and of the questions of law and of fact involved in it, I feel it my duty to indicate my view of the questions that arise for the decision of this Tribunal.

On April 29, 1946 the eleven prosecuting nations named above filed their indictment against twenty-eight persons. Accused MATSUOKA, Yosuke and NAGANO, Osami died during the pendency of this trial and accused OKAWA, Shumei was discharged from the present proceeding because of his mental incompetency. The remaining twenty-five persons are now arraigned as accused before us to take their trial for what has been stated to be the major war-crimes.

Evidence has been given in this case connecting each of the accused

with the Government of Japan during the relevant period. Details showing this connection will be given as occasion arises.

The charges against these accused persons are laid in fifty-five counts grouped in three categories:

1. Crimes against Peace. (Count 1 to Count 36)
2. Murder. (Count 37 to Count 52)
3. Conventional War Crimes and Crimes against Humanity. (Count 53 to Count 55)

The counts of charges are prefaced by an introductory summary amply indicating the nature of the prosecution case and are appended with five appendices in the nature of bills of particulars.

In the language of the prosecution itself -

"In Group One, Crimes against Peace as defined in the Charter are charged in thirty-six counts. In the first five counts the accused are charged with conspiracy to secure the military, naval, political and economic domination of certain areas, by the waging of declared or undeclared war or wars of aggression and of war or wars in violation of international law, treaties, agreements and assurances. Count 1 charges that the conspiracy was to secure the domination of East Asia and of the Pacific and Indian Oceans; Count 2, domination of Manchuria; Count 3, domination of all China; Count 4, domination of the same areas named in Count 1, by waging such illegal war against sixteen specified countries and peoples. In Count 5, the accused are charged with conspiring with Germany and

Italy to secure the domination of the world by the waging of such illegal wars against any opposing countries. The prosecution charges in the next twelve counts (6 to 17) that all or certain accused planned and prepared such illegal wars against twelve nations or people attacked pursuant thereto. In the next nine counts (18 to 26) it is charged that all or certain accused initiated such illegal wars against eight nations or peoples, identifying in a separate count each nation or people so attacked. In the next ten counts (27 to 36) it is charged that the accused waged such illegal wars against nine nations or peoples, identifying in a separate count each nation or people so warred upon.

"In Group Two, murder or conspiracy to murder is charged in sixteen counts (37 to 52). It is charged, in Count 37, that certain accused conspired unlawfully to kill and murder people of the United States, the Philippines, the British Commonwealth, the Netherlands, and Thailand (Siam), by ordering, causing and permitting Japanese armed forces, in time of peace, to attack those people in violation of Hague Convention III, and in Count 38, in violation of numerous treaties other than Hague Convention III.

"It is charged in the next five counts (39 to 43) that the accused unlawfully killed and murdered the persons indicated in Counts 37 and 38 by ordering, causing and permitting, in time of peace, armed attacks by Japanese armed forces, on December 7 and 8, 1941, at Pearl Harbor, Kota Bahru, Hong Kong, Shanghai and Davao.

The accused are charged in the next count (44) with conspiracy to procure and permit the murder of prisoners of war, civilians and crews of torpedoed ships.

"The charges in the last eight counts (45 to 52) of this group are that certain accused, by ordering, causing and permitting Japanese armed forces unlawfully to attack certain cities in China (Counts 45 to 50) and territory in Mongolia and of the Union of Soviet Socialist Republics (Counts 51 and 52), unlawfully killed and murdered large numbers of soldiers and civilians.

"In Group Three, the final group of counts (53 to 55), other conventional War Crimes and Crimes against Humanity, are charged. Certain specified accused are charged in Count 53 with having conspired to order, authorize and permit Japanese commanders, War Ministry officials, police and subordinates to violate treaties and other laws by committing atrocities and other crimes against many thousands of prisoners of war and civilians belonging to the United States, the British Commonwealth, France, Netherlands, the Philippines, China, Portugal and the Union of Soviet Socialist Republics.

"Certain specified accused are directly charged in Count 54 with having ordered, authorized and permitted the persons mentioned in Count 53 to commit offences mentioned in that Count. The same specified accused are charged in the final count (55) with having violated the laws of war by deliberately and recklessly disregarding their legal duty to take

adequate steps to secure the observance of conventions, assurances and the laws of war for the protection of prisoners of war and civilians of the nations and peoples named in Count 53."

Summarized particulars in support of the counts in Group One are presented in Appendix A of the Indictment. In Appendix B are collected the Articles of Treaties violated by Japan as charged in the counts for Crimes against Peace and the Crime of Murder. In Appendix C are listed official assurances violated by Japan and incorporated in Group One, Crimes against Peace. Conventions and Assurances concerning the laws and customs of war are discussed in Appendix D, and particulars of breaches of the laws and customs of war for which the accused are responsible are set forth therein. Individual responsibility for crimes set out in the indictment and official positions of responsibility held by each of the accused during the period with which the indictment is concerned are presented in Appendix E.

In presenting its case at the hearing the prosecution offered what it characterized to be "the well-recognized conspiracy method of proof". It undertook to prove:

1. (a) that there was an over-all conspiracy;

   (b) that the said conspiracy was of a comprehensive character and of a continuing nature;

   (c) that this conspiracy was formed, existed and operated during the period from 1 January 1928 to 2 September 1945;

2. that the object and purpose of the said conspiracy consisted in the complete domination by Japan of all the territories generally known as Greater East Asia described in the indictment;

3. that the design of the conspiracy was to secure such domination by -

   (a) war or wars of aggression;

   (b) war or wars in violation of -

      (i) international law

      (ii) treaties

      (iii) agreements and assurances

4. that each accused was a member of this over-all conspiracy at the time any specific crime set forth in any count against him was committed.

The prosecution claimed that as soon as it would succeed in proving the above matters, the guilt of the accused would be established without anything more and that it would not matter whether any particular accused had actually participated in the commission of any specified act or not.

In counts one to five the accused are charged with having participated in the formulation or execution of a common plan or conspiracy, the object of such plan or conspiracy being the military, naval, political and economic domination of certain territories and the means designed for achieving this object being;

1. declared or undeclared war or wars of aggression;

2. war or wars in violation of -

(a) international law,

(b) treaties,

(c) agreements and assurances.

It is implied in these charges that acts in execution of such plan were performed. The accused are sought to be made criminally liable for such acts.

In these counts the questions that would arise for our decision are:

1. Whether military, naval, political and economic domination of one nation by another is a crime in international life;

2. Whether war or wars

(a) of aggression,

or

(b) in violation of

(i) international law

(ii) treaties

(iii) agreements and assurances

are crimes in international life and whether their legal character would in any way depend upon their being initiated with or without declaration.

Counts six to seventeen charge the accused only with having planned and prepared wars of the categories mentioned above. In order to sustain these charges it is essential that such wars must be criminal or illegal.

Counts eighteen to twenty-four relate to initiation of wars of the same categories and would, therefore, stand or fall according as such wars are or are not crime in international life.

Counts twenty-five to thirty-six charge the accused or some of them with having waged wars of the same categories and would thus fail if such wars are not crime in international life.

Counts thirty-seven to fifty-two contain charges on the footing that hostilities started in breach of treaties would not have the legal character of war and did not therefore confer on the Japanese forces any right of lawful belligerents.

I shall examine these several counts in detail later on. It is obvious that they all involve the question whether wars of the categories mentioned above became crime in international life.

The prosecution case is that these accused persons did the acts alleged in course of working the machinery of the Government of Japan taking advantage of their position in that Government. Grounds of individual responsibility for the alleged crimes are set out in Appendix E of the Indictment thus:

> "It is charged against each of the accused that he used the power and prestige of the position which he held and his personal influence in such a manner that he promoted and carried out the

offences set out in each Count of this Indictment in which his name appears.

"It is charged against each of the accused that during the periods hereinafter set out against his name he was one of those responsible for all the acts and omissions of the various governments of which he was a member, and of the various civil, military or naval organizations in which he held a position of authority.

"It is charged against each of the accused, as shown by the numbers given after his name, that he was present at and concurred in the decision taken at some of the conferences and cabinet meetings held on or about the following dates in 1941, which decisions prepared for and led to unlawful war on 7 and 8 December, 1941."

The acts alleged are, in my opinion, all <u>acts of state</u> and whatever these accused are alleged to have done, they did that in working the machinery of the government, the duty and responsibility of working the same having fallen on them in due course of events.

Several serious questions of international law would thus arise for our consideration in this case. We cannot take up the questions of fact without coming to a decision on these questions.

<u>The material questions of law</u> that arise for our decision are the following:

1. Whether military, naval, political and economic domination of one nation by another is crime in international life.

2. (a) Whether wars of the alleged character became criminal in international law during the period in question in the indictment.

If not,

(b) Whether any ex post facto law could be and was enacted making such wars criminal so as to affect the legal character of the acts alleged in the indictment.

3. Whether individuals comprising the government of an alleged aggressor state can be held criminally liable in international law in respect of such acts.

Several subsidiary questions of law will also fall to be decided before we can justly take up the evidence in this case. These questions will be indicated in their proper places in course of the decision of the main questions specified above. But before all this, I must dispose of some preliminary matters concerning ourselves.

The accused at the earliest possible opportunity expressed their apprehension of injustice in the hands of the Tribunal as at present constituted.

The apprehension is that the Members of the Tribunal being representatives of the nations which defeated Japan and which are accusers in this action, the accused cannot expect a fair and impartial trial at their hands and consequently the Tribunal as constituted should not proceed with this trial.

Regarding the Constitution of the Court for the trial of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in primciple, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states. Hall suggests that "it should be possible for both the victor and the vanquished in war to be able to bring to trial before an impartial court persons who are accused of violating the laws and usages of war".

I feel tempted in this connection to quote the views of Professor Hans Kelsen of the University of California which may have the effect of turning our eyes to one particular side of the picture likely to be lost sight of in a "floodlit courthouse where only one thing is made to stand out clear for all men to see, namely that the moral conscience of the world is there reasserting the moral dignity of the human race".

The learned Professor says: "It is the jurisdiction of the victorious states over the war criminals of the enemy which the Three Power Declaration signed in Moscow demand..... It is quite understandable that during the war the peoples who are the victims of the adominable crimes of the Axis Powers wish to take the law in their own hands in order to punish the criminals. But after the war will be over our minds will be open again to the consideration that criminal jurisdiction exercised by the injured state over enemy subjects is considered by the peoples of the delinquents as

vengeance rather than justice, and is consequently not the best means to guarantee the future peace. The punishment of war criminals should be an act of international justice, not the satisfaction of a thirst for revenge. It does not quite comply with the idea of international justice that only the vanquished states are obliged to surrender their own subjects to the jurisdiction of an international tribunal for the punishment of war crimes. The victorious states too should be willing to transfer their jurisdiction over their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal."

The learned Professor further says: "As to the question - what kind of tribunal shall be authorized to try war criminals, national or international, there can be little doubt that an international court is much more fitted for this task than a national, civil, or military court. Only a court established by an international treaty, to which not only the victorious but also the vanquished states are contracting parties, will not meet with certain difficulties which a national court is confronted with....."

Though not constituted in the manner suggested by the learned Professor, here is an international tribunal for the trial of the present accused.

The judges are here no doubt from the different victor nations, but they are here in their personal capacities. One of the essential factors usually considered in the selection of members of such tribunals is

moral integrity. This of course embraces more than ordinary fidelity and honesty. It includes "a measure of freedom from prepossessions, a readiness to face the consequences of views which may not be shared, a devotion to judicial processes, and a willingness to make the sacrifices which the performance of judicial duties may involve". The accused persons here have not challenged the constitution of the tribunal on the ground of any shortcoming in any of the members of the tribunal in these respects. The Supreme Commander seems to have given careful and anxious thought to this aspect of the case and there is a provision in the Charter itself permitting the judges to decline to take part in the trial if for any reason they consider that they should not do so.

Ordinarily, on an objection like the one taken in this connection, the judges themselves might have expressed their unwillingness to take upon themselves the responsibility. Administration of justice demands that it should be conducted in such a way as not only to assure that justice is done but also to create the impression that it is being done. In the classic language of Lord Hewart, Lord Chief Justice of England, "It is not merely of some importance, but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.....Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". The fear of miscarriage of justice is constantly in

the mind of all who are practically or theoretically concerned with the law and especially with the dispensation of criminal law. The special difficulty as to the rule of law governing this case, taken with the ordinary uncertainty as to how far our means are sufficient to detect a crime and coupled further with the awkward possibilities of bias created by racial or political factors, makes our position one of very grave responsibility. The accused cannot be found fault with, if, in these circumstances, they entertain any such apprehension, and I, for myself, fully appreciate the basis of their fear. We cannot condemn the accused if they apprehend, in their trial by a body as we are, any possible interference of emotional factors with objectivity.

We cannot overlook or underestimate the effect of the influence stated above. They may indeed operate even unconsciously. We know how unconscious processes may go on in the mind of anyone who devotes his interest and his energies to finding out how a crime was committed, who committed it, and what were the motives and psychic attitude of the criminal. Since these processes may remain unobserved by the conscious part of the personality and may be influenced only indirectly and remotely by it, they present permanent pitfalls to objective and sound judgment -- always discrediting the integrity of human justice. But in spite of all such obstacles it is human justice with which the accused must rest content. We, on our part, should always keep in view the words of the Supreme Commander for the Allied Powers with which Mr. Keenan closed his opening statement and avoid the eagerness to accept as real anything that

lies in the direction of the unconscious wishes, that comes dangerously near to the aim of the impulses.

With these observations I persuade myself to hold that this objection of the accused need not be upheld.

The defense also took several other objections to the trial; of these the substantial ones may be subdivided under two heads:

1. Those relating strictly to the jurisdiction of the Tribunal.
2. Those which, while assuming the jurisdiction of the Tribunal, call on the Tribunal to discharge the accused of the charges contained in several counts on the ground that they do not disclose any offense at all.

Some of these objections even related to war crimes stricto sensu alleged to have been committed during the war which ended in the surrender. As preliminary objections, these are of no substance.

A war, whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare. No pact, no convention has in any way abrogated jus-in-bello.

So long as States, or any substantial number of them, still contemplate recourse to war, the principles which are deemed to regulate their conduct as belligerents must still be regarded as constituting a vital part of international law. There is a persistent tendency on the part of the belligerents to shape their conduct according to what they consider to be their own needs rather than the requirements of international justice. Strong measures are required to curb this tendency in

the belligerent conduct.

War crimes stricto sensu, as alleged here, refer to acts ascribable to individuals concerned in their individual capacity. These are not acts of State and consequently the principle that no State has jurisdiction over the acts of another State does not apply to this case.

Oppenheim says: "The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself as he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon

the authorities of the defeated state the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And, although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes."

Similar views are expressed by Hall and Garner.

"The principle", says Garner, "that the individual soldier who commits acts in violation of the laws of war, when these acts are at the same time offenses against the general criminal law, should be liable to trial and punishment, not only by the courts of his own state, but also by the courts of the injured adversary in case he falls into the hands of the authorities thereof, has long been maintained....."

Hall says: "A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands.....To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of <u>universally acknowledged laws</u>."

It should only be remembered that this rule applies only where the crime in question is not an act of state. The statement that if an act is forbidden by international law as a war crime, the perpetrator may be punished by the injured state if he falls in its hands is correct only with this limitation that the act in question is not an act of the enemy state.

In my judgment, it is now well-settled that mere high position of the parties in their respective states would not exonerate them from criminal responsibility in this respect, if, of course, the guilt can otherwise be brought home to them. Their position in the State does not make every act of theirs an act of state within the meaning of international law.

The first substantial objection relating to the jurisdiction of the Tribunal is that the crimes triable by this Tribunal must be limited to those committed in or in connection with the war which ended in the surrender on 2 September 1945. In my judgment this objection must be sustained. It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence. There is nothing in the Potsdam Declaration and in the Instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to proceed against the persons who might have committed crimes in or in connection with any other war.

The prosecution places strong reliance on the Cairo Declaration read with paragraph 8 of the Potsdam Declaration and urges that the Cairo

Declaration by expressly referring to all the acts of aggression by Japan since the First World War in 1914 vested the Allied Powers with all possible authority in respect to those incidents. The relevant passage in the Cairo Declaration runs thus: "It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent."

The Potsdam Declaration in paragraph 8 says: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine".

These Declarations are mere announcements of the intention of the Allied Powers. They have no legal value. They do not by themselves give rise to any legal right in the United Nations. The Allied Powers themselves disown any contractual relation with the vanquished on the footing of these Declarations: Vide paragraph 3 of the Authority of the Supreme Commander.

As I read these Declarations I do not find anything in them which will amount even to an announcement of intention on the part of the declarants to try and punish war criminals in relation to these incidents. I am

prepared to go further. In my judgment, even if we assume that these Declarations can be read so as to cover such cases, that would not carry us far. The Allied Powers by mere declaration of such an intention would not acquire in law any such authority. In my view, if there is any international law which is to be respected by the nations, that law does not confer any right on the conqueror in a war to try and punish any crime committed by the vanquished not in connection with the war lost by him but in any other unconnected war or incident.

The Cairo Declaration referred to in the Potsdam Declaration rather goes against the contention of the prosecution. That Declaration expressly refers to certain specified past matters and proclaims what steps should be taken in respect to them. I do not find anything in that Declaration which would suggest any trial or punishment of any individual war criminal in connection with those past events. Nor do I find anything in the Charter which would entitle us to extend our jurisidction to such matters.

In my opinion, therefore, crimes alleged to have been committed in or in connection with any conflict, hostility, incident or war not forming part of the war which ended in the surrender of the 2nd September 1945 are outside the jurisidction of the Tribunal.

The defense claims the following incidents to be thus outside our jurisdiction, namely, -

1. The Manchurian Incident of 1931.

2. The activities of the Japanese Government in the Province of

Liaoning, Kirin, Heilungkiang and Jehol.

3. The armed conflicts between Japan and the USSR relating to Lake Khasan affairs and Khalkhingol River affairs.

This will affect our jurisdiction over the matters involved in counts 2, 18, 25, 26, 35, 36, 51 and 52 of the Indictment. Apart from their being parts of the overall conspiracy charged in count 1, the hostilities relating to these matters ceased long before the Potsdam Declaration of 26 July 1945 and the Japanese Surrender of 2 September 1945.

In the Indictment the prosecution makes the case of an over-all conspiracy in count 1 which, if proved, may bring in all these incidents as part of the war which ended in the aforesaid Surrender.

The question, thus, ultimately becomes a question of fact to be determined on the evidence in the case.

If on the evidence on the record we are unable to find the over-all conspiracy as alleged in count 1, then, in my opinion, the charges in the above named counts would fall for want of our jurisdiction.

I may now take up the material questions of law involved in the case as specified above. These were also raised by the defense in their preliminary objections.

The questions are:

1. Whether a war of the alleged character is crime in international law.
2. Whether individual members of a State commit a crime in international law by preparing, etc. for such a war.

LAW APPLICABLE TO THE CASE:

I shall, first of all, take up the question whether the Charter establishing this Tribunal, in any way, obliges it to apply any particular law other than what may be determined by the Tribunal itself to be the international law, and, if so, what that law is, - whether the Charter has defined "war crimes" and whether the Tribunal is bound by that definition, if any, in determining the guilt of the persons under trial here.

The indictment in one place mentions the offences as "Crimes against Peace, War Crimes, and Crimes against Humanity as defined in the

Charter of this Tribunal", and in another, characterizes them as "Crimes against Peace, War Crimes, and Crimes against Humanity and of Common Plans or Conspiracies to Commit these Crimes, all as defined in the Charter of the Tribunal".

In grouping the counts, "Crimes against Peace are characterized as being acts for which it is charged that the persons named and each of them are individually responsible in accordance with Article 5 and particularly Article 5(a) and (b) of the Charter of the International Military Tribunal for the Far East and in accordance with International Law, or either of them."

Group Two, Murder, is named as "being acts for which it is charged that the persons named and each of them are individually responsible, being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, contrary to all the paragraphs of Article 5 of the said Charter, to International Law, and to the domestic laws of all the countries where committed, including Japan, or to one or more of them".

Group Three, Conventional War Crimes and Crimes against Humanity, are named as "being acts for which it is charged that the persons named and each of them are individually responsible, in accordance with Article 5 and particularly Article 5(b) and (c) of the Charter of the International Military Tribunal for the Far East, and in accordance with International Law, or either of them".

Mr. Keenan in opening the case for the prosecution devoted considerable time to what purported to be a statement of the law upon

which the indictment is based, but again kept the position vague. He said. "In the first instance, what constitutes cognizable crime by this Tribunal is defined by the Charter." He then proceeded to define and explain conspiracy, saying, "The first offense charged in the indictment is conspiracy. Since this offense is merely named and not defined, some definition must be made." By saying "this offense is merely named and not defined", he seems to have meant, named in the Charter and not defined there. After explaining conspiracy, Mr. Keenan proceeded thus: "The next offenses charged run through Counts 6 to 36 in various forms; but the same essential elements are contained in all, that is: '"The planning, preparation, initiation or waging of a declared or undeclared war of aggression"', or '"The planning, preparation, initiation or waging of a war in violation of international law, treaties, agreements or assurances"'.

"Taking the first section of this definition, the essential element here is "war of aggression". Is this a crime under international law, and has it been so understood during all the time referred to in the indictment? We claim that it is and has been. To reach this conclusion we must establish two things: First, that there is international law covering the subject, and second, that it is a crime under that law. The establishment of these two things is, we believe, among the important questions before this Tribunal."

He then proceeds to examine the international law on the point and invites the Tribunal to take judicial notice of the fact "that there is a large body of International Law known at different times and by

different writers as the "common law" or "general law" or "natural law" or "international law".

My appreciation of the position taken up by the prosecution in this case is that according to it, it is the already existing rules of international law, existing at the date of commission of the acts alleged, on which the indictment is based, and that whether the charges shall stand or fall will depend upon what view the Tribunal takes of those rules.

Mr. Comyns Carr for the prosecution made this position clear in his address of 14 May 1946 at the hearing of the preliminary objection taken by the Defense Counsel as to the jurisdiction of this Tribunal. He said:

> "We are not asking this Tribunal to make any new law, nor are we admitting that the Charter purports to create any new offence."

According to him, international law itself

> "being the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances ... it is unquestionably within the power, and ... the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case."

The position is made clearer by the Prosecution in the final summation of the case. In its summation the prosecution submitted that 'the Charter is conclusive as to the composition and jurisidction of the Tribunal and as to all matters of evidence and procedure'. "As to the crimes listed in Article 5", the prosecution submission was "that the charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards and indeed before". The prosecution urged the Tribunal to examine this proposition and to base its judgment upon it.

But whatever be the prosecution view, in my opinion, the criminality or otherwise of the acts alleged must be determined with reference to the rules of international law existing at the date of the commission of the alleged acts. In my opinion, the charter cannot and has not defined any such crime and has not, in any way, limited our authority and jurisdiction to apply the rules of international law as may be found by us to the facts alleged in this case.

The prosecution is stated to be "pursuant to the Potsdam Declaration of 20 July, 1945, and the Instrument of Surrender of 2nd September, 1945, and the Charter of the Tribunal."

The relevant provisions of the Potsdam Declaration in question are contained in paragraphs 5 to 8, 10 and 13 and they stand thus:

> "5. Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.
>
> "6. There must be eliminated for all time the authority and influence of those who have deceived and misled the people of

Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"7. Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objective we are here setting forth.

"8. The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"10. We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

"13. We call upon the Government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

The Instrument of Surrender acceded to this demand and in paragraph two proclaimed unconditional surrender thus:

"We hereby proclaim the Unconditional Surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated."

I need only quote also the last paragraph of this instrument for my present purpose. The paragraph stands thus:

"The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."

The expression "unconditional surrender" has almost become an expression of art in the military vocabulary to mean admission of total defeat. Some trace the history of its origin to the scene at Appomattox, Virginia, where on April 9, 1865, General Robert E. Lee commanding the Confederate Army, surrendered to General Ulysses S. Grant, then leading the Federal Forces. But we are not concerned with the history of the expression. For our present purpose we are concerned with, not how it came to possess a particular import, but what is its import. Unconditional surrender implies a complete defeat and an admission of such complete defeat. It imports complete surrender to the might and mercy of the victor. What the vanquished gets, he gets, not by a stipulation, but by the grace of the victor; it does not matter

that some indication of the policy to be followed is graciously indicated by the victor even before the formal surrender. Of course, by saying this, I do not mean to say that the defeated party has no protection whatsoever from the whims of the victor's might. International law and usage purport to define the rights and duties of the victor in such a case. However impotent such law may be to afford any real protection, it at least does not legally place the vanquished at the absolute mercy of the victor.

We shall see later what is the position of the victor nations as such in international law in relation to a conquered nation. All that I need point out here is that so far as the terms of the demand of surrender and of the ultimate surrender go there is nothing in them to vest any absolute sovereignty in respect of Japan or of the Japanese people either in the victor nations or in the Supreme Commander. Further there is nothing in them which either expressly or by necessary implication would authorize the victor nations or the Supreme Commander to legislate for Japan and for the Japanese or in respect of war crimes. It will be pertinent to notice here that in vesting authority on the Supreme Commander the victor nations did not claim any authority derived from the vanquished under any agreement.

The authority of the Supreme Commander in paragraph 3 runs thus:

"The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document, It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East."

I would now come to the Charter constituting this Tribunal. The relevant provisions are contained in Articles 1, 2, 5 and 6 and they stand thus:

SECTION I

CONSTITUTION OF TRIBUNAL

"Article 1. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"Article 2. Members. The Tribunal shall consist of not less than six nor more than eleven Members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

SECTION II

JURISDICTION AND GENERAL PROVISIONS

"Article 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"a. Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared

war of agression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

"b. Conventional War Crimes: Namely, violations of the laws or customs of war;

"c. Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Excepting these the Charter contains no other provisions having any bearing on the question under consideration. There is no express provision in the Charter making it obligatory on the Tribunal either to apply or to exclude any particular law.

Before proceeding to examine the provisions of the Charter in relation to the question now under consideration, I would like to dispose of one branch of the arguments of the defense in this connection, based, I am inclined to believe, on a misconception of a well-recognized rule of construction of statutes arising from the principle of non-retroactivity of law. The defense wanted to say that the definitions, if any, in the Charter would be void on this principle.

The rule denying retroactivity to a law is not that law cannot be made retroactive by its promulgator, but that it should not ordinarily be made so and that if such retroactive operation can be avoided courts should always do that.

The Charter here is clearly intended to provide a court for the trial of offenses, if any, in respect of past acts. There cannot be any doubt as to this scope of the Charter and consequently it is difficult for us to read into its provisions any non-retroactivity.

Nor can it be denied that if the promulgator of the Charter was at all invested with any authority to promulgate a law, his authority was in respect of acts which are all matters of the past and already completed.

The real questions that arise for our consideration are:

1. Whether the Charter has defined the crime in question; if so,
2. Whether it was within the competence of its author so to define the crime;
3. Whether it is within our competence to question his authority in this respect.

Article 5 of the Charter, it is said, defines the different categories of crimes. The article in its plain terms purports only to provide for "jurisdiction over persons and offenses". In so doing the Charter says: "the following acts.....are crimes coming within the jurisdiction of the Tribunal....." The intention, in my opinion, is not to enact that these acts do constitute crimes but that the crimes, if any, in respect to these acts, would be triable by the Tribunal. Whether or not these acts constitute any crime is left open for determination by the Tribunal with reference to the appropriate law. In my opinion, this is the only possible view that we can take of these provisions of the Charter. The Potsdam Declaration and the Instrument of Surrender certainly did not contemplate that the Allied Powers would have authority to give, whatever character they might choose, to past acts and then meet such acts with such justice as they might, in the future, determine. It is impossible to read into these instruments any such authority and I cannot for a moment imagine that the Allied Powers would assume such a grave power in violation of the solemn declarations made in them, and perhaps in disregard of international law and usage. I do not see any reason why we should

make such an uncharitable assumption against the Allied Powers or against the Supreme Commander when such reading of the Charter is not the only possible reading.

It will be interesting to notice here what Lord Wright says in connection with the Tribunal set up for the trial of the major war criminals of the European Axis countries.

Referring to the Agreement of August 8, 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic and of the Union of Soviet Socialist Republics, establishing the Tribunal for the trial and punishment of the major war criminals of the European Axis countries, Lord Wright says:

"The Agreement includes, as falling within the jurisdiction of the Tribunal, persons who committed the following crimes:

"(a) Crimes against Peace, which means in effect, planning, preparation, initiation or waging of a war of aggression;

"(b) War crimes, by which term is meant mainly violation of the laws and customs of war;

"(c) Crimes against Humanity, in particular, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

"The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under International Law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of International Law.

"I understand the Agreement to import:

"(a) That the three classes of persons which it specifies are war criminals;

"(b) That the acts mentioned in classes (a), (b), and (c) are crimes for which there is properly individual responsibility;

"(c) (i) That they are not crimes because of the agreement of the four governments;

"(ii) But that the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law.

"On any other assumption the Court would not be a Court of Law, but a manifestation of power."

The same principles apply with equal force in the present case also. We have been set up as an International Military Tribunal. The clear intention is that we are to be "a judicial tribunal" and not "a manifestation of power". The intention is that we are to act as a court of law and act under international law. We are to find out, by the application of the appropriate rules of international law, whether the acts constitute any crime under the already existing law, dehors the Declaration, the Agreement or, the Charter. Even if the Charter, the Agreement or the Declaration schedules them as crimes, it would only be the decision of the relevant authorities that they are crimes under the already existing law. But the Tribunal must come to its own decision. It was never intended to bind the Tribunal by the decision of these bodies, for otherwise the Tribunal will

not be a 'judicial tribunal' but a mere tool for the manifestation of power.

The so-called trial held according to the definition of crime now given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengence can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through genuine legal process alone may contribute substantially to the re-establishment of order and decency in international relations."

But that is not the only consideration which influences me to the view I am taking of the Charter in this respect. The contrary view would make the Charter ultra vires.

The terms of authority of the Supreme Commander have been quoted above. These are in the simplest possible form and nowhere expressly authorize the Supreme Commander to define the provisions of international law.

It is contended in this connection that the Moscow Declaration made the intention of the Allied Powers in this respect clear and that there the Allied Powers clearly proclaimed that "war criminals" would mean and include persons who are now classed as having committed offenses against peace.

The Moscow Declaration was released on November 1, 1943 and I could not discover anything in this document which would support this view. The Declaration refers to war criminals stricti sensu. The only reference to others is in the last paragraph which stands thus:

> "The above declaration is without prejudice to the case of the major criminals, whose offenses have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies."

The document nowhere says who are these "major criminals". In the earlier parts of the document actual perpetrators of the various cruelties in violation of jus in bello are specifically named; these major criminals may only be the persons responsible for issuing general orders, if any, relating to those cruel actions. But even assuming that the expression

was intended to include persons responsible for the preparation of aggressive war, the Declaration does not say that the Allied Powers had scheduled them as war criminals irrespective of their legal position in this respect under international law. Even if the Allied Powers intended to do that, this, their Declaration alone, will not invest them with any such legal authority, if international law be otherwise. This might have been a declaration of threat on the strength of might; but if the Allied Powers, instead of executing the might, choose to place the matter in the hands of judicial tribunal, by this very fact they express their intention clearly enough that they want to deal with such persons according to law.

It will be pertinent here to notice what Professor Hans Kelsen of the University of California has said regarding the position of the victor in this respect. I am referring to him in this connection as his is the view most favorable to the prosecution. The learned Professor says:

"If the individuals who are morally responsible for this war, those persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as authors of the war shall be made legally responsible by the injured states, it is necessary to take into consideration:

"1. That general international law does not establish individual, but collective responsibility for the acts concerned, and

"2. That the acts for which the guilty persons shall be punished are acts of state -- that is, according to general international law, acts of the government or performed at the government's command or with its authorization."

According to the learned Professor:

"If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an international court, the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished, by which treaty jurisdiction over these individuals is conferred upon the national or international court." The learned Professor then points out: "If it is a national court, then this court functions, at least indirectly, as an international court. It is national only with respect to its composition insofar as the judges are appointed by one government only; it is international with respect to the legal basis of its jurisdiction."

The law of a state, says Professor Kelsen, contains no norms that attach sanctions to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. The substantive law applied by a national court competent to

punish individuals for such acts can be international law only. Hence, the international treaty must not only determine the delict but also the punishment, or must authorize the international court to fix the punishment which it considers to be adequate.

According to Professor Kelsen: "An international treaty authorizing a court to punish individuals for acts they have performed as acts of state constitutes a norm of international criminal law with retrospective force, for the acts were at the moment when they were committed not crimes for which the individual perpetrators were responsible."

With due respect I do not accept all the propositions propounded by the learned Professor in support of the legality of trial and punishment of such criminals. I cannot accept the view that by such a treaty ex post facto law can always be created and applied to the case of such persons. It is, however, not necessary for me to quarrel with this proposition in the present connection. Here there is no such treaty; and the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.

From what has been stated above it seems amply clear that if the Allied Powers as victors have not, under the international law, the legal right to treat such persons as war criminals, they have not derived any such right by a treaty or otherwise. The Allied Powers have nowhere given the slightest indication of their intention to assume any power

which does not belong to them in law. It is therefore pertinent to inquire what is the extent of the lawful authority of a victor over the vanquished in international relations. I am sure no one in this Twentieth Century would contend that even now this power is unlimited in respect of the person and the property of the defeated. Apart from the right of reprisal, the victor would no doubt have the right of punishing persons who had violated the laws of war. But to say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at its will, it will, like David Low's "Peace", be surprised to find itself back on the same spot whence it started on its apparently onward journey several centuries ago. Perhaps humanity also will feel the same inward surprise though it may be civilized enough not to give any outward expression of the same.

When Lord Wright says that the victors have accurately defined the crime in accordance with the existing international law, he overlooks the fact that if it is not open to the Tribunal to examine this definition with reference to the existing law, it becomes a definition now given by the victor, though it may happen to be a correct definition. In my opinion, such a power is opposed to the principles of international law and it will be a dangerous usurpation of power by the victor, unwarranted by any principle of justice.

While considering the questions whether aggressive war can be denominated an international crime and whether individuals comprising the government or general staff of an aggressor state may be prosecuted as liable for such crime, Dr. Glueck says that the Charter under which the International Military Tribunal at Nuernberg is supposed to operate gives dogmatically affirmative answers to both of the questions. In his view "there is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a Charter; and it may well be that the Tribunal at Nuernberg will deem itself completely bound by the restrictions above quoted" (i.e. Articles 6 and 7 of the Nuernberg Charter, corresponding to Articles 5 and 6 of the present Charter).

The Tribunal at Nuernberg seems to have deemed itself bound by the so-called definition of the law given in the relevant charter. But in fairness to the prosecution in the case before us it must be pointed out that it does not claim any conclusive character for the present charter in this respect. According to the prosecution "The Charter is conclusive as to the composition and jurisdiction of the Tribunal and as to all matters of evidence and procedure." As to the crimes listed in Article 5, the prosecution submits that "the Charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards. ." We are urged by the prosecution to examine this proposition and base our judgment upon it. The prosecution, of course, does not say what we are to do in case we find the international law in this respect to be otherwise.

Assuming that the supposed definition given in the Charter does not represent the correct position under international law, I can understand Dr. Glueck if he means to say that the Charter is the act of the will of the conqueror and therefore must be obeyed by those who are bound to obey such will. But I fail to see how Dr. Glueck can speak of the conqueror having authority so to will. I believe the existing international law nowhere confers on the conqueror any such authority. Neither the belligerent rights with respect to the person of an enemy nor the conqueror's rights with respect to such person would cover any such authority. Neither the rights following the military occupation of an enemy territory nor the rights following the conquest of such a territory would confer such an authority on the invader or the conqueror. Whether the accused be treated as prisoners of war or not, they are not legally at the mercy of the invader or the conqueror. Only military necessity seems to invest the invader or the conqueror with very wide power and perhaps it is impossible to set bounds to the demands of such military necessity. But even there it must be remembered that military necessity is not a mere phrase of convenience, but is to be an imperative reality.

A belligerent, besides having the rights over his enemy which flew directly from the right to attack, no doubt also possesses the right of punishing persons who have violated the laws of war, if they fall into his hands. Hall says: "To the exercise of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of universally acknowledged laws...When, however,

the act done is not universally thought to be illegitimate...it may be doubtful whether a belligerent is justified in enforcing his own views to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind." Hall is here speaking of war crimes stricti sensu and even in such cases the belligerent's own view of the law does not justify his action or will. In my opinion a conqueror does not enjoy any higher right in this respect in international law.

It is also my opinion that an International Tribunal, by whomsoever set up and manned, is not bound by any such expression of the will of the conqueror. I need not stop here to examine this question further as in my opinion the Charter does not define the crime but only specifies the acts the authors whereof are placed under the jurisdiction of the Tribunal.

The prosecution refers us to the judgment of the Nurenberg Tribunal in this respect. In delivering the judgment of that Tribunal, Lord Justice Lawrence, referring to the provisions of the Charter establishing that Tribunal, is reported to have observed as follows:

> "These provisions are binding upon the Tribunal as the law to be applied to the case. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts."

Later while considering 'the Law of Charter' his Lordship said:-

"The jurisdiction of the Tribunal is defined in the agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive and binding upon the Tribunal."

Coming later to the definition in the Charter, his Lordship said:

"It was urged on behalf of the defendants that a fundamental principle of all law - international and domestic - is that there can be no punishment of crime without a pre-

existing law. Nullum crimen sine lege, nulla poena sine lege. It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and

punish offenders,

His Lordship then said:

"In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but it is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished....."

According to Lord Justice Lawrence:

"This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned." He said: "The General Treaty, for the Renunciation of War of August 27, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939.

"The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal the solemn

renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact....."

The question as to what is international law dehors the Charter and where the law stood after the Pact of Paris will be discussed later. Here we are concerned only with that part of the observations of Lord Justice Lawrence which deals with the obligatory character of the Charter.

I would not arrogate to myself the duty of examining the scope of the other Charter in order to see whether or not it defined war crimes. I would assume that it did so define as was held by the other Tribunal. Assuming that the Charter purported so to define war crimes the question is whether this definition is intra vires.

Lord Justice Lawrence considers that the maxim nullum crimen sine lege has no application to the case as it is not a maxim in limitation of sovereignty but is only a principle of justice.

I am not quite sure if the Constitution of the U.S.A., in its Article I Sections 9 and 10 providing that "no ex post facto law shall be passed" by the Congress and "no state shall --- pass any ex post

facto law", did not limit its sovereignty itself in this respect. The author of the Charter in the case before us derived his authority at least in part from the U.S.A., and, so far as his power of legislation is concerned, it may be subject to this limitation, at least when this power is sought to be supported as delegated by that sovereignty. But let us proceed on the assumption that the characterization of the maxim by Lord Justice Lawrence is correct and let us see how the question of sovereignty comes in.

Lord Justice Lawrence says: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

His Lordship continues: "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of the might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

According to his Lordship: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London agreement. . . ."

Lord Justice Lawrence refers to "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered." He again refers to "what any one of the Signatory Powers might have done singly." It is thus not very clear which sovereignty was in the mind of Lord Justice Lawrence when he made these observations. It may be that His Lordship had in his mind either one or both of the following two sovereignties:

1. The sovereignty of the defeated state,

2. The sovereignty of the victor state.

This portion of the judgment comes under the heading "The Law of the Charter", and it seems to deal with two distinct matters relating to the question of jurisdiction. The first is the question of creation of the Tribunal and the second is that of defining the law to be administered by the Tribunal thus created.

These observations of Lord Justice Lawrence, therefore, involve the following questions:

1. (a) Whether the victor states in the right of their own respective national sovereignties can try and punish prisoners of war falling within their custody for War Crimes;

(b) Whether, for this purpose, they can in the right of their own sovereignty

(i) set up a Tribunal for such a trial,

(ii) legislate defining such war crimes.

2. Whether any state (victor or vanquished) in exercise of its right of sovereignty

(a) can try and punish <u>its own citizens</u> for war crimes,

and (b) for this purpose can,

(i) set up a tribunal for such a trial,

(ii) legislate defining such war crimes.

3. (a) Whether a victor state derives the sovereignty of a defeated state

(i) by reason of the unconditional surrender of the vanquished state,

or (ii) by the terms of the surrender,

or (iii) by anything more.

(b) If so, whether this acquired sovereignty includes all the rights, ordinary and extraordinary, of the vanquished sovereign.

The pronouncements are not very clear so far as these several questions are concerned. It is not, for example, clear what is intended to be pronounced as "not to be doubted" about any nation's right. The judgment says, "it is not to be doubted that any nation has the right <u>thus</u> to set up special courts to administer law." If this refers to the question of

setting up of special courts, we need not trouble ourselves with it here. If, however, it refers to the right of "defining the law" such "court is to administer", I respectfully beg to differ from the view thus expressed. International law certainly does not yet recognize any such right in any nation.

The observations of Lord Justice Lawrence seem to contain the following pronouncements:

1. War criminals are within the jurisdiction of:
   (a) their own national state
   (b) the belligerent state when they fall within its custody.
2. (a) Their national state had power to legislate defining war crime;
   (b) By reason of surrender, this power now vests in the victor state.
3. (a) Any belligerent state within whose custody such persons might come had right to legislate defining their crime;
   (b) The combined victor states also consequently have that right.

As I have already noticed there is no quarrel with the first of the above three propositions. But the entire difficulty is with the propositions 3(a) and 2(b) as set down above.

No one, I believe, will seriously support the proposition marked 3(a) above. As I have noticed already, prisoners can be tried and punished only for breaches of recognized rules of law. Any power of the nature contemplated in item 3(a) above will obliterate the centuries of civilization which stretch

between us and the days of summary slaying of the vanquished.

The questions whether the Charter is or is not "an arbitrary exercise of power on the part of the victor nations," and whether it is or is not "the expression of international law existing at the time of its creation" and to that extent is or is not "itself a contribution to international law are not relevant for our present purpose. If the authors of the charter had the right to legislate and give the law which the Tribunal would be bound to administer, then while administering that law, the Tribunal would have no business to raise such questions. If such authors are ever called upon to justify their action, then only such considerations would be relevant. The question now before us is whether the author or authors of the charter had right to legislate and give the law defining war crimes for the trial of the prisoners of war in their custody."

Professor Quincy Wright of the Board of Editors of the American Journal of International Law, in an Article entitled "The Law of Nuremberg Trial" published in the Journal in January 1947 referring to this part of the judgment says: "Every state does . . . have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offenses threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter." It is not clear if Professor Wright wants to support even the belligerent's right to legislate for the purpose of defining 'war crimes'. I hope he did not purport to do any such thing. As I read his view, it seems even to limit the belligerents' power of trial only to cases when the act over and above being a criminal act under the

According to him "Art. 5 of the Moscow Declaration of November 1, 1943 and Art. 2(6) of the Charter of the United Nations support the idea that the four Powers acting in the interest of the United Nations had the right to legislate for the entire community of nations."

Indeed occasions may sometimes arise for such desperate efforts!

Article 5 of the Moscow Declaration runs thus: "That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations."

Article 2(6) of the United Nations Charter says that the organization shall ensure that non-members act in accordance with the principle of Article 2, so far as may be necessary for the maintenance of international peace and security.

I do not see what is there in these provisions which authorizes such a revolutionary creation of ex post facto international law. Of course, law can also be created illegally otherwise than by the recognized procedures - ex injuria jus oritur: Any law now created in this manner and applied will perhaps be the law henceforth.

Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes. When such a nation or group of nations proceed to

recognized rule of law, goes also to threaten the security of the belligerent state.

Professor Wright's reference to the Lotus case and the conclusions drawn therefrom do not, in any way, advance the case of the alleged legislative power of the victor states. Extending criminal jurisdiction is one thing, and extending the criminal law itself by defining 'crime' is a different thing. In my opinion, the principle of international law forbids a state from doing this last thing in respect of Prisoners of War in its custody.

A victor state, as sovereign legislative power of its own state, might have right to try prisoners of war within its custody for war crimes as defined and determined by the international law. But neither the international law nor the civilized world recognizes any right in it to legislate defining the law in this respect to be administered by any court set up by it for the purpose of such trial.

I am further inclined to the view that this right which such a state may have over its prisoners of war is not a right derivative of its sovereignty but is a right conferred on it as a member of the international society by the international law.

A victor nation promulgating such a Charter is only exercising an authority conferred on it by international law. Certainly such a nation is not yet a sovereign of the international community. It is not the sovereign of that much desired superstate.

Professor Wright suggests a novel source for this legislative power.

According to him "Art. 5 of the Moscow Declaration of November 1, 1943 and Art. 2(6) of the Charter of the United Nations support the idea that the four Powers acting in the interest of the United Nations had the right to legislate for the entire community of nations."

Indeed occasions may sometimes arise for such desperate efforts!

Article 5 of the Moscow Declaration runs thus: "That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations."

Article 2(6) of the United Nations Charter says that the organization shall ensure that non-members act in accordance with the principle of Article 2, so far as may be necessary for the maintenance of international peace and security.

I do not see what is there in these provisions which authorizes such a revolutionary creation of ex post facto international law. Of course, law can also be created illegally otherwise than by the recognized procedures - ex injuria jus oritur: Any law now created in this manner and applied will perhaps be the law henceforth.

Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes. When such a nation or group of nations proceed to

promulgate a Charter for the purpose of the trial of war criminals, it does so only under the authority of international law and not in exercise of any sovereign authority. I believe, even in relation to the defeated nationals or to the occupied territory a victor nation is not a sovereign authority.

At any rate the sovereignty is recognized by the civilized world to have been limited in this respect by the international law at least in respect of its power over the Prisoners of War within its custody.

The next question is whether the victor nations derived the sovereignty of the defeated nations by reason of the latter's defeat and unconditional surrender, and whether a sovereignty thus acquired or derived vested the victor nations with the legislative power in question.

The judgment mentions "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered." It is not very clear what is the view of Lord Justice Lawrence about the acquisition or the derivation of this "sovereign legislative power" by the victor countries. If his line of approach is dependent on any special factual features of the case before him, namely, that the character and terms of the surrender or of occupation in question vested the victors with the sovereignty of the vanquished state, then very little remains for me to say in this connection excepting that the terms of surrender here in the case before us and the character of occupation did not vest the sovereignty of Japan in the victor nations.

I have quoted the relevant terms of the Potsdam Declaration, as also, of the instruments of surrender. Reference may here be made to clauses

7, 8 and 10 of the instruments. We should also remember that in spite of the limited occupation by the Allied Powers the Government of Japan has all along been allowed to function.

Professor Quincy Wright in supporting this part of the judgment seems to enunciate the following propositions:

1. The derivation of the Tribunal's jurisdiction from the sovereignty of Germany is well-grounded:

   (a) such derivation is supportable on the special factual feature of the case;

   or (b) as a legal consequence of the surrender.

2. Under International law a state may acquire sovereignty of territory by declaration of annexation after subjugation of the territory if that declaration is generally recognized by the other states of the world;

   (a) There is no doubt but that sovereignty may be held jointly by several states;

   (b) (i) The Four Allied Powers assumed the Sovereignty of Germany in order, among other purposes, to administer the country until such time as they thought fit to recognize an independent German Government;

   (ii) Their exercise of powers of legislation, adjudication, and administration in Germany during this period is permissible under international law, limited only by the rules of international law applicable to sovereign states in territory they have subjugated;

(iii) Their powers go beyond those of a military occupant.

It is not very clear whether he too considers this derivation of sovereignty as the result of the special factual features of the German case.

I have already indicated that the factual position in this respect in the case before us is quite different.

As a proposition of international law 'that the unconditional surrender transfers the sovereign legislative power of the vanquished state from it to the victor', it has no support in international law as it stood during the relevant war.

As has been warned by Oppenheim "subjugation must not be confounded with conquest, although there can be no subjugation without conquest". "Conquest is taking possession of enemy territory by military force, and is completed as soon as the territory is effectively occupied." "A belligerent, although he has annihilated the forces and conquered the whole of the territory of his adversary, and thereby brought the armed contention to an end, may nevertheless not choose to exterminate the enemy state by annexing the conquered territory, but may conclude a treaty of peace with the . . . defeated state, re-establish its government and hand back to it the whole or a part of the conquered territory. Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory. Subjugation may, therefore, be correctly defined as extermination in war of one belligerent by another through

annexation of the former's territory after conquest, the enemy forces having been annihilated."

I need not pursue the question whether the legal effect of subjugation would be the derivation of the sovereignty of the defeated state by the victor state. In my opinion, even assuming that the victor state becomes the sovereign of the subjugated territory, it is wrong to say that such sovereignty is derived from the defeated state or the defeated people and hence is the continuation of the sovereignty of the defeated state. Even if it is a sovereignty, it is a sovereignty of the victor state now extended to the subjugated territory. If it is a sovereignty at all it is not derived from the vanquished people or the vanquished state - but is acquired in spite of them.

I would not call it a sovereignty of the defeated state at all. That state is non-est, having been annihilated. A new state might have come into existence; but such a state is based entirely on the might of the conqueror. The sovereignty of the vanquished state, or, more correctly, the sovereignty of which the vanquished state was the depositary is annihilated with its depositary or only remains in abeyance. Indeed the sovereign power is not a mysterious subject which might be severed from the state itself; it is only a general personification of the sum total of the conception and activity of the state so far as it has became self-conscious and asserts its functions self-consciously.

Whatever that be, the case before us, is not one of subjugation, though it is a case of complete defeat and unconditional surrender.

It is obvious that mere conquest, defeat and surrender, conditional

or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a military occupant. A military occupant is not a sovereign of the occupied territory.

But even assuming that in international law, a victor state derives the sovereignty of the vanquished state, the former would not have the power claimed for it even in this capacity.

Prisoners of war, so long as they remain so, are under the protection of international law. No national state, neither the victor nor the vanquished, can make any ex post facto law affecting their liability for past acts, particularly when they are placed on trial before an international tribunal. Their own state might try and punish them in its own national court, either already existing or created specially for the purpose; and, even if we assume that for this purpose, it might create some ex post facto law binding on such national tribunal, it does not follow that it would have been competent to create law for the application by an international tribunal. So long as the prisoners are placed on trial before an international tribunal, it does not matter whether as prisoners of war, by the victor state, or, as its citizens, by the vanquished state, neither state can legislate so as to give any ex post facto law to be applied by that international tribunal in order to determine their crime. Such states might have an option in the matter of setting up the tribunal: they might create a national tribunal for the trial. We are not concerned with what they might or might not have done in defining the law in such a

case. But as soon as they set up an international tribunal, they cannot create any law defining the crime for such a tribunal.

It may be observed in passing that the Charter of a German Sovereign giving some law for its national court would not, I am sure, be in any extent, a contribution to international law. This question of the scope of legislative power in respect of the trial and punishment of prisoners of war for war crimes will arise for our consideration also in connection with the charges in the present indictment regarding the trial and punishment of the U.S. air pilots by Japan. There, of course, the prosecution denies any such power to the Japanese government.

Mr. Justice Jackson of the United States in his report as Chief of Counsel for the United States in prosecuting the principal war criminals of the European Axis observed:

> "We could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride."

It is, indeed, surprising that no less a person than Mr. Justice Jackson, in his considered report to no less an authority than the President of the United States, could insert these lines in the Twentieth Century. On what authority, one feels inclined to ask, could a victor execute enemy prisoners without a hearing? I need not stop here to consider what would be the legal position of a victor if we accept the view that by the Pact of Paris war has been renounced as an instrument of national policy rendering such a war a crime and that such a war only entitles the other party to a right of self-defense. Whether the weapon of defense can be of any avail to the victor for any acquisitive or aggressive purposes is a question which we need not consider here. Even apart from any limiting effect of the outlawry of war on the victor's rights, I do not think that during recent centuries any victor has enjoyed any such right as is declared by Mr. Justice Jackson in his report. If the victor really had such a right then perhaps it might have been

possible for him to give a new definition of a crime in respect of past acts and punish the prisoners as criminals according to such new definition after hearing them if that would ease the conscience of any nation. In that case it would have been mere adaptation of a particular method to the enforcement of an existing right. But I do not see anything anywhere in the existing international law conferring any such power on the victors. Neither temporary military occupation of a territory nor final acquisition by conquest, if acquisition by war is even now possible, of a territory and subjugation would confer any such rights on the occupying belligerent or victor over the inhabitants or over the prisoners either taken during the war or after truce. Even under the martial law of the occupant the position of the prisoners and of the inhabitants of the occupied territory is not so helpless.

Whatever view of the legality or otherwise of a war may be taken, victory does not invest the victor with unlimited and undefined power now. International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offence according to this new definition. This is really not a norm in abhorrence of the retroactivity of law: It is something more substantial. To allow any nation to do that will be to allow usurpation of power which international law denies that nation.

2. That apart from the Charter they have no power at all; and

3. That each judge of this Tribunal accepted the appointment to sit under the Charter and that apart from the Charter he cannot sit at all nor pronounce any order at all.

From these they conclude that this Tribunal is not competent to try the question whether the Supreme Commander has exceeded his mandate, "as the Charter has not remitted such a question to it".

I sincerely regret I cannot persuade myself to accept this view. I believe the Tribunal, established by the Charter, is not set up in a field unoccupied by any law. If there is such a thing as international law, the field where the Tribunal is being established is already occupied by that law and that law will operate at least until its operation is validly ousted by any authority. Even the Charter itself derives its authority from this international law. In my opinion it cannot override the authority of this law and the Tribunal is quite

Keeping all this in view my reading of the Charter is that it does not purport to define war crimes; it simply enacts what matters will come up for trial before the Tribunal, leaving it to the Tribunal to decide, with reference to the international law, what offense, if any, has been committed by the persons placed on trial.

A view seems to have been entertained in some quarters that as this Tribunal is set up by the victor nations, it is not competent to question their authority in respect of any of the provisions of the Charter establishing the Tribunal. Even the view expressed by Lord Wright in his Article on "Nuremberg" may bear this construction. Lord Wright in this Article after having quoted the provisions contained in Article 6 of the Nuremberg Charter, observed: "these provisions defined the law to be applied by the Tribunal and were binding on it." Later on he said: "The judges could not, of course, question the competency of their appointment and refuse to apply the definitions of the law laid down in the London Agreement and the Charter. . ." I donot see why questioning any legislation purporting to give definitions of the law would necessarily involve questioning the competency of the judges' appointment. I must confess, I do not see any principle in support of this view.

Those who entertain this view, say: -

1. That "the sole sources of the powers of the judges of the Tribunal are the Charter and their appointments to act under the Charter";

2. That apart from the Charter they have no power at all; and

3. That each judge of this Tribunal accepted the appointment to sit under the Charter and that apart from the Charter he cannot sit at all nor pronounce any order at all.

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competent, under the authority of this international law, to question the validity or otherwise of the provisions of the Charter. At any rate unless and until the Charter expressly or by necessary implication overrides the application of international law, that law shall continue to apply and a Tribunal validly established by a Charter under the authority of such international law will be quite competent to investigate the question whether any provision of the Charter is or is not ultra vires. The trial itself will involve this question. Its specific remittance for investigation by the Charter will not be required.

In national systems it is not inconceivable that an authority competent to set up a Tribunal may not at the same time be competent to legislate. In such a case simply because such an authority sets up a Tribunal by a document wherein it also purports to legislate, the Tribunal would not be incompetent to declare that piece of legislation ultra vires.

As I have pointed out above, a victor nation is, under the international law, competent to set up a Tribunal for the trial of war criminals, but such a conqueror is not competent to legislate on international law. A tribunal set up by such a nation will certainly be a valid body. But if the nation in question purports also to legislate beyond its competency under the recognized rules of international system, that legislation may be ultra vires and I do not see what can debar the Tribunal from examining this question if called upon to apply this legislated norm. It makes no difference in this respect that the same document which sets up the Tribunal also purports to legislate. This fact would not obligate the Tribunal:

1. To uphold the authority of its promulgator in every other respect.

2. To uphold every provision of the document promulgating the Tribunal.

3. To construe the Charter in any particular manner.

After a careful consideration of the question I come to the conclusion:

1. That the Charter has not defined the crime in question;

2. (a) That it was not within the competence of its author to define any crime;

   (b) That even if any crime would have been defined by the Charter that definition would have been ultra vires and would not have been binding on us.

3. That it is within our competence to question its authority in this respect.

4. That the law applicable to this case is the international law to be found by us.

The principal question which thus ultimately arises for our decision is whether the acts alleged in the indictment under the category of "Crimes against Peace" constituted any crime under the international law.

The acts alleged are "the planning, preparation and initiation" of wars of specified characters.

It is not the prosecution case that "war", irrespective of its

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It is not the prosecution case that "war", irrespective of its

character, became a crime in international law. Their case is that a war possessing the alleged character was made illegal and criminal in international law and that consequently persons provoking such criminal war by such acts of planning, etc., committed a crime under international law.

Two principal questions therefore arise here for our decision, namely;

1. Whether the wars of the alleged character became criminal in international law.
2. Assuming wars of the alleged character to be criminal in international law, whether the individuals functioning as alleged here would incur any criminal responsibility in international law.

I would take up the first of these questions first.

For the sake of convenience the question may be considered with reference to four distinct periods, namely:

1. That up to the First World War of 1914;
2. That between the First World War and the date of the Pact of Paris (27 August 1928);
3. That from the date of the Pact of Paris to the commencement of the World War under consideration;
4. That since the Second World War.

So far as the first of the above four periods is concerned it seems

to be generally agreed that no war became crime in international life, though it is sometimes asserted that a distinction between "just" and "unjust" war had always been recognized. It may be that international jurists and philosophers sometimes used these distinctive expressions in their learned discourses. But international life itself never recognized this distinction and no such distinction was ever allowed to produce any practical result. At any rate an "unjust" war was not made "crime" in international law. In fact any interest which the western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period and none of these wars perhaps would stand the test of being "just war".

During the second of the above periods Mr. Quincy Wright writing in 1925 on "The Outlawry of War", said:

> "Under present international law "acts of war" are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a "state of war" is neither legal nor illegal.
>
> "A state of war is regarded as an event, the origin of which is outside of international law although that law prescribes rules for its conduct differing from those which prevail in time of peace. The reason for this conception, different from that of antiquity and the Middle Ages, was found in the complexity of the causes of war in the present state of international relations, in the difficulty of locating responsibility in the present regime of

constitutional governments and in the prevalence of the scientific habit of attributing occurrences to natural causes rather than to design.

"Insofar as wars cannot be attributed to acts of responsible beings, it is nonsense to call them illegal. They are not crimes but evidences of disease. They indicate that nations need treatment which will modify current educational, social, religious, economic, and political standards and methods insofar as they affect international relations."

Senator Borah, on December 12, 1927, in his Resolution before the United States Senate, stated thus:

"Whereas, war is the greatest existing menance to society,

. . . . . and

"Whereas, civilization has been marked in its upward trend out of barbarism into its present condition by the development of law and courts to supplant methods of violence and force; and

. . . . . .

"Whereas, war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and is strictly within its legal rights, and . . . .

"Whereas, the overwhelming moral sentiment of civilized people everywhere is against the cruel and destructive institution of war; .

"Resolved, that it is the view of the Senate of the United States that war between nations should be outlawed as an institution

or means for the settlement of international controversies by making it a public crime under the law of nations, and that every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war-breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article I, Section 8, of our Federal Constitution, which clothes the Congress with the power to define and punish offenses against the law of nations....."

So even on the 12th day of December 1927, Senator Borah could say that "War between nations has always been and still is a lawful institution and that "any nation may, with or without cause, declare war against other nation and be strictly within its legal rights..." I fully agree with this view. As the preamble itself shows, Senator Borah, in making this statement, was fully alive to the evil of t[illegible] war.

In the 8th edition of Hall's International Law (1924), we find the following passages:

"As international law is destitute of any judicial or administrative machinery, it leaves states, which think themselves aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions. Theoretically, ... as it (international law) professes to cover the whole field of the relations of states which can be brought within the scope of law, it ought to determine

the causes for which war can be justly undertaken; ..... it might also not unreasonably go on to discourage the commission of wrongs by subjecting a wrongdoer to special disabilities.

"The first of these ends it attains to a certain degree, though very imperfectly.....In most of the disputes which arise between states, the grounds of quarrel, though they might probably be always brought into connection with the wide fundamental principles of law, are too complex to be judged with any

certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not, therefore, possible to frame general rules which will be of any practical value.

"The second end international law does not even endeavor to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war when it is powerless to enforce its decisions ..... International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."

I need not stop here to express my view of the character of an international community or of international law. Both the expressions are used in specific senses in relation to international life as I would endeavor to show later. But even taking them in unqualified sense, no

distinction was made between just and unjust war or between non-aggressive and aggressive war, and no difference in the legal character of a war was based on any such distinction.

In the 6th edition (1944) of Oppenheim's "International Law", revised by Dr. Lauterpacht of the University of Cambridge, we find the following statement:

> "....So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the <u>justice or otherwise</u> of the cause of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived every war was just."

Whether the legal position has now changed after the covenants and the Pact of Paris will be examined later. So far as the position unaffected by such covenants and pacts is concerned, it seems amply clear that no war became crime during <u>the first two of the above four periods</u>. War might have been an evil in international life; it might have become even its disease as Mr. Quincy Wright says; but certainly was not a crime.

Before leaving these two periods it would be fair to point out that at least two distinguished international jurists of the present age seem to think that aggressive war became crime in international life during perhaps the second of these periods. I mean Dr. Glueck of the United States of America and Mr. Trainin of the U.S.S.R. Dr. Glueck seems to think that a customary international law developed making aggressive war a crime in international life. According to Mr. Trainin even before the Second World War there were "two tendencies of the historical process", -- one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law - the tendency reflecting the policy of the aggressive nations in the imperialistic era - and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, tendency in which is reflected the policy of a new and powerful international factor - the socialist state of the toilers, the U.S.S.R.

According to him there was some scope for the introduction of the conception of criminal responsibility in international life in view of the second tendency named above.

In my opinion neither view is sustainable. I would examine them in detail while considering the position during the next period.

Coming now to <u>the third of the periods</u> specified above,

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namely, the period beginning with the Pact of Paris, I must say there has already come into existence a formidable array of literature relating to the question. A careful examination of these various authorities would, I believe, yield the following conflicting results:

1. The Kellogg-Briand Pact made resorting to a war of aggression a delict: (Prof. Hans Kelsen of the University of California)

2. The Pact of Paris failed to make violations of its terms an international crime punishable either by national courts or some international tribunal: (Mr. George A. Finch and Dr. Glueck of the U.S.)

3. (a) The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime: (Dr. Glueck)

   (b) Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources, "general principles of law", "international custom" and teachings of the most highly qualified publicists, no less than "international conventions" and 'judicial decisions' there can be little doubt that international law had designated as crimes the acts . . . . specified in the Charter long before the acts charged against the defendants

were committed. (Prof. Wright)

4. (a) The Pact of Paris is the evidence of the acceptance by the civilized nations of the principle that war is an illegal thing. (Lord Wright)

(b) This principle so accepted and evidenced is entitled to rank as a rule of international law. (Lord Wright)

(c) The Pact of Paris converted the principle that "aggressive war is illegal" from a rule of "natural law" to a rule of "positive law". (Lord Wright and Prof. Wright)

(d) International law, being a living and operative force in these days of widening sense of humanity, has progressed, and an international court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is entitled and bound to hold that it is: (Lord Wright)

5. (a) (i) In order that there may be international crime, there must be international community: (Mr. Trainin and Lord Wright)

(ii) There is a community of nations, though imperfect and inchoate: (Mr. Trainin and Lord Wright)

(iii) The basic prescription of this community is the existence of peaceful relations between States: (Mr. Trainin and Lord Wright)

(b) (i) War is a thing evil in itself: It breaks international peace: (Mr. Trainin and Lord Wright)

(ii) It may be justified on some specified grounds: (Lord Wright)

(iii) A war of aggression falls outside that justification, and is, therefore, a crime. (Lord Wright)

(c) Whatever might have been the legal position of war in an international community prior to the Pact of Paris, the Pact clearly declared it to be an illegal thing: (Lord Wright)

6. Since the Moscow Declaration of 1943 and as a result of the same, a new international society has developed. To

> facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form of these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundations of international relations. (Mr. Trainin)

This last proposition of Mr. Trainin really falls to be considered in relation to the fourth period specified above. But I would examine it along with the other propositions formulated by the learned author.

I would first of all proceed to examine <u>the effect of the Pact of Paris</u>.

In my opinion the Pact did not in any way change the existing international law. It failed to introduce any new rule of law in this respect.

The question falls to be considered <u>from two distinct viewpoints</u>, namely:

1. Whether the Pact made any war a crime in international life?
2. Whether the Pact introduced the question of justification of war in international life and thus, making aggressive war unjustifiable, made such a war a crime or an illegal thing by reason of its own harmful character?

The Pact commonly known as the Kellogg-Briand Pact or the Pact of

Paris was signed on the 27th August 1928.

In the preamble, after acknowledging a deep sensibility of their solemn duty to promote the welfare of mankind, the parties announce that:

"Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

"Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interest by resort to war, should be denied the benefits furnished by this treaty;

"Hopeful that, encouraged by their example, all other nations of the world will join in this humane endeavor, and by adhering to the present treaty as soon as it comes into force, bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy; they have agreed to the following articles:

Article 1. The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Article 3. The present treaty shall be ratified by the High Contracting Parties, in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other powers of the world....."

It will be profitable to have a brief sketch of the history of the Pact.

I would start from the abortive Geneva Protocol of 1924. In the preamble of this Protocol, the parties declared themselves to be animate by the firm desire to ensure the maintenance of general peace and the security of nations, whose existence, independence or territories may be threatened, purported to recognize the solidarity of the members of the international community, and asserted "that a war of aggression constituted a violation of this solidarity and was an international crime". The purpose of the Protocol was declared to be the realization of the reduction of the national armaments to the lowest point consistent with national safety, the enforcement by common action of international obligations. The Protocol was never ratified by the several states, and consequently, never came to have any legal effect. In these circumstances, the assertion in this document that aggressive war is international crime, produced no legal consequences. But it might have given birth to the idea of condemning aggressive war in international life.

On the 6th September 1927, the representative of the Netherlands, in the 8th Assembly of the League of Nations, put forth a draft resolution

in taking up the study of the fundamental principles of the Geneva Protocol again. The leading opponents of the Geneva Protocol had been Great Britain and the self-governing Dominions of the British Crown. This opposition continued, and this attempt at revival failed.

During this Eighth Session of the League Assembly, however, on the 24th September 1927, the following Polish Resolution was adopted:

"The Assembly

"Recognizing the solidarity which unites the community of nations

"Being inspired by a firm desire for the maintenance of general peace;

"Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;

"Considering that a solemn renunciation of all wars of aggressio would tend to create an atmosphere of general confidence, calculated to facilitate the progress of the work undertaken with a view to disarmament:

"Declares:

"1. That all wars of aggression are, and shall always be, prohibited.

"2. That every pacific means must be employed to settle disputes of every description which may arise between states."

It may be noted that this Resolution already contained the two featur

of the Pact of Paris, namely:

1. A renunciation of a certain kind of war;
2. An undertaking not to seek the settlement of international disputes by other than pacific means.

At the last plenary session of the Sixth International Conference of American States, which sat at Havana from the 16th January to the 20th February 1928, the Mexican Delegate introduced a resolution to the effect that:

1. All aggression is considered illicit and as such is declared prohibited.
2. The American States will employ all pacific means to settle conflicts which may arise between them.

This resolution was accepted at the conference.

In the meantime, France was thinking of celebrating the tenth anniversary of the entry of the United States into the General War. The date fell on the 6th April 1927. Monsieur Briand met Professor James T. Shotwell on the 22nd March, who formulated to him the idea of renunciation of war as an instrument of national policy. Following his suggestion, Monsieur Briand sent a personal message to the American people, suggesting that France and the United States might celebrate the occasion by subscribing publicly to some mutual engagement tending to outlaw war as between these two countries. He interpreted the American slogan "to outlaw war" as meaning "the renunciation of war as an instrument of

national policy".

This gave rise to correspondence between Monsieur Briand and Mr. Kellogg. On the 1st June 1927, Briand transmitted to Kellogg a draft treaty of his own, consisting of a preamble and three articles. This was intended only to be a bilateral instrument. These three articles eventually reappeared as the three articles of the Pact signed on the 27th August, 1928, with little change of the text, apart from what was required to alter the same into a multilateral one.

In the meantime, the then existing Franco-American Arbitration Treaty of 1908, which was due to expire on the 27th February, 1923, was replaced by a new treaty, duly signed on the 6th February, 1928, containing a new preamble, with a declaration to the effect that the two parties were:

> "Eager by their example not only to <u>demonstrate</u> their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of <u>international arrangements</u> for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the powers of the world."

As regards the other treaty, Mr. Kellogg, in his note of the 28th December, 1927, suggested that the treaty for the renunciation of war, proposed by Monsieur Briand, should not be merely bilateral, but multilateral.

There followed a conflict. The French Government insisted that, if the treaty was to be multilateral, the terms proposed by Monsieur Briand should be <u>qualified</u>; the American Government insisted that the text of

the Pact, even in case of its being made multilateral, should be as in the proposed draft. Eventually the French Government accepted a suggestion from the American Government that the two governments should jointly submit to the Governments of Germany, Great Britain, Italy and Japan, the correspondence exchanged between them since June. The U.S.S.R. was excluded up to this stage.

In the third phase, Mr. Kellogg, on the 13th April 1928, issued a circular letter to the German, British, Italian, and Japanese Governments, submitting to these governments the draft of a multilateral treaty to be signed by all the surviving great powers except the U.S.S.R. The two substantive articles of this draft were identical with those of Briand's draft of the preceding June, except some verbal change making it multilateral.

On the 20th April, the French Government circulated to the same powers an alternative draft in which the two substantive articles were expanded to five, and a number of qualifications and provisos were introduced in precise terms. This French draft sought to bring to a point the various provisos, interpretations, and understandings that had been put forward on the French side in the course of the Franco-American correspondence.

On the 29th April, Mr. Kellogg dealt with these French considerations in a speech delivered before the American International Law Association, to demonstrate that the French desiderata could be satisfied within the framework of the draft circulated by him. This he did, not only to his immediate audience, but to the governments and to the world at large. These interpretations were the turning point of the whole transaction. The

British, the Italian, and the Japanese Governments had before them Kellogg's interpretative exposition of the 2[illegible]th April 1928, before they had dispatched their replies to Kellogg's note of the 13th April.

I need not stop here to examine the long series of correspondence that followed after this. Eventually, the British Government accepted Kellogg's proposal of the 13th April, as read together with his speech of the 29th, in a long and reasoned note dated the 19th May 1928. Further, the British Government suggested that Mr. Kellogg's invitation should be extended to the British self-governing Dominions and to India, and postulated an understanding which came to be nicknamed as the "British Monroe Doctrine". Mr. Kellogg promptly acted upon the suggestion of extending an invitation to the Governments of the Dominions and India, and received favorable replies from them all by the middle of June. As regards the postulate, the British Government did not either demand that it should be incorporated in the text of the treaty or formulate it in so many words as a British reservation. They did, however, reassert this postulate in a note of the 18th July 1928, in the act of accepting the treaty re-submitted by Mr. Kellogg in its definitive form; and on the 6th August they forwarded copies of the two notes of the 19th May and the 18th July to the Secretary General of the League of Nations at Geneva, with a request that they should be circulated to the governments of other states members.

The postulate in question stood thus:

"The language of Article I, as to the renunciation of war as an instrument of national policy, renders it desirable that

I should remind Your Excellency that there are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defense. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests, any disregard of which by a foreign power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government."

On the 23rd June, 1928, Mr. Kellogg dispatched another circular note to the several governments, quoting therein the interpretative paragraphs from his speech of the 29th April. With this note the draft treaty was re-submitted with no change in the text of the articles, but with a modification in the preamble postulating "that any signatory power which" should thereafter "seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty".

The treaty was accepted by the various governments in this form.

Before the Senate of the United States ratified the Pact, Mr. Kellogg often appeared before the Senate Committee on Foreign Relations, and in the colloquies between the Secretary of State and individual members of the committee, most of the controversial points were brought out. On the question whether the terms of the treaty were affected by the previous correspondence between the signatory powers, Mr. Kellogg stuck to the opinion that there was nothing in any of those notes that was not contained, explicitly or implicitly, in the treaty itself. On the question of self-defense, Mr. Kellogg declared that the right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned, and that under the treaty, each state would have the prerogative of judging for itself, what action the right of self-defense covered and when it came into play, subject to the risk that this judgment might not be endorsed by the rest of the world. "The United States must judge.....and it is answerable to the public opinion of the world if it is not an honest defense; that is all." This is Mr. Kellogg's own statement.

This is how the Pact of Paris came into being and what it was intended to convey by its authors.

The account given above is substantially taken from that given by Professor Toynbee. It indicates that the parties thereto intended to create by this Pact only a contractual obligation. Its originators did not design it for the entire Community of Nations. There were several reservations introduced by the several parties for their respective

interests. This is compatible with contractual obligations, but not with law. No doubt it was a multilateral treaty or pact. But though a law can be created only by a multilateral treaty, every multilateral treaty does not create law. A rule of law, once created, must be binding on the states independently of their will, though the creation of the rule was dependent on its voluntary acceptance by them. The obligation of this Pact, however, always remains dependent on the will of the states, inasmuch as it is left to these states themselves to determine whether their action was or was not in violation of the obligation undertaken by the Pact.

Apart from any other consideration, the single fact that war in self-defense in international life is not only not prohibited, but that it is declared that each state retains "the prerogative of judging for itself what action the right of self-defense covered and when it came into play" is, in my opinion, sufficient to take the Pact out of the category of law. As declared by Mr. Kellogg, the right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned.

Considerations relevant for the determination of the legal character of rules of conduct obtaining in society are:

1. That only through final ascertainment by agencies other than the parties to the dispute can the law be rendered certain; it is not rendered so by the ipse dixit of an interested party. Such certainty is of the essence of law.

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2. That it is essential for the rule of law that there should exist agencies bearing evidence of or giving effect to the imperative nature of law.

The law's external nature may express itself either in the fact that it is a precept created independently of the will of the subject of the law, or that no matter how created, it continues to exist in respect of the subjects of the law independently of their will.

The Pact of Paris as explained by Mr. Kellogg and as understood and accepted by the parties thereto would not stand these tests. The reservation of the right of self-defense and self-preservation in the form and to the extent explained by Mr. Kellogg would take the Pact out of the category of a rule of law.

It must also be remembered that in the present state of the international life this reservation cannot be lightly dealt with. At the present stage of international community, if it can be called a community at all, this right of self-defense or self-preservation is even now a fundamental right and follows from the very nature of international relations. The whole of the duties of states are normally subordinate to this right.

Hall says:

"Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary, and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation

can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles.....There are..... circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved.....

"The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, succeed, either through the helplessness of the country or by means of intrigues with a party within it.....

"States possess a right of protecting their subjects abroad." Rivier gives an account of this right of self-defense or self-preservation thus: "These rights of self-preservation (conservation, respect, independence and mutual trade, which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (loi)

of the law (droit) of nations, and the common constitution of our political civilization . The recognition of a state in the quality of a subject of the law of nations implies ipso jure the recognition of its legitimate possession of those rights. They are called essential, or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights."

"When", Rivier says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. Primum vivere. A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the state of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound, to violate the right of another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse."

According to Kaufmann, the state is the instrument of an ideal which can justly claim the subjection of its members to an imposed command. That ideal is self-preservation and self-development in history in a world of competing physical forces represented by other states. This ideal can be ultimately fulfilled only by physical and moral force on the part of the state; it can be fulfilled only by enlisting all the

physical and moral powers of its members. The essence of the state is power, as revealed in victorious war.

According to Hegel, the relation of states is one of independent entities which make promises, but at the same time stand above their promises. Nothing done in the interest of the preservation of the state is illegal.

There are writers who support the view that there is nothing higher than the interest of each of the parties as judged by each party himself. If the other party is unwilling to give in, then only war can decide whose interest is legally stronger. This, according to them, is not the denial of law, but the only legal proof possible in international life.

Westlake, who takes a more restricted view of the right says:

> "What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defense. A state may defend itself by preventive means if, in its conscientious judgment necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing, it will be acting in a manner intrinsically defensive, even though externally aggressive. In attack, we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it or amply compensation, when the nature of the case admits compensation. And by due repression we intend such as will

effectually prevent all but trifling injuries (de minimis non curate lex), even though the want of such repression may arise from the powerlessness of the government in question. The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organization of the world continues."

These different views of the right of self-defense are not of much consequence to us for our present purposes. What is necessary for us to notice is that the conception of aggression being only the complement of that of self-defense, so long as the question whether a particular war is or is not in self-defense remains unjusticiable, and is made to depend only upon the "conscientious judgment" of the party itself, the Pact fails to add anything to the existing law. It only serves to agitate the opinion of the world, and the risk involved in its violation lies only in rousing an unfavorable world opinion against the offending party. Nothing can be said to be "law" when its obligation is still for all practical purposes dependent on the mere will of the party.

Professor Lauterpacht points out that "the question of the fulfillment of the Pact of Paris has been treated as non-justiciable matter as the result of the determination of its principal signatories to remain the sole judges whether a case for self-defense (that is for disregarding the object of the treaty) has arisen". The question is undoubtedly of the highest importance for the state concerned, but, as Professor Lauterpacht

very rightly points out, it is at the same time par excellence a question capable of judicial cognizance. The claim that it should be removed from the purview of judicial determination is not an illustration of non-justiciability of important matters, but a controversial interpretation calculated to reduce the value of the Pact of Paris as a legal instrument.

The question before us, however, is not whether the fulfillment or non-fulfillment of the Pact was capable of judicial cognizance, but whether it was so made by the Parties. Remembering that the question is entirely dependent upon the Covenant of the Parties--upon the meaning of the Parties to the Covenant, if the Parties themselves intended to give it a particular meaning or have understood and acted upon it in a particular way, it is not open to us now to ascribe any other meaning to it.

The learned Professor suggests that probably the view as to the impossibility of judicial determination of the recourse to force in self-defense is due to the confusion of two different aspects of this question. There is, first, the actual use of force when a state believes its life and vital interests to be endangered beyond possibility of redress if immediate action is not taken, when, in the words of the classical definition, a state believes that there is a necessity for action which is instant, overwhelming, and leaving no choice of means and no moment for deliberation. It is of the essence of the legal conception of self-defense that recourse to it must, in the first instance, be a matter for the judgment of the state concerned. But this is no reason why it should not remain justiciable to see if the state really had any occasion

so to believe- why the legitimacy of the action taken should not be justiciable.

It is rightly pointed out that:

> "It is not the right of self-defense which threatens to introduce the principal element of disintegration into the General Treaty for the Renunciation of War. The passible element of disintergration lies in the assertion that recourse to self-defense is not amenable to judicial determination."

If this were the correct interpretation of the Treaty, then, it is admitted that the result would be <u>to deprive it of its legal value</u> as a means of preventing war. The Treaty would stamp as unlawful such wars only as the belligerents might openly declare to be undertaken with the intention of aggression. It could not be described as rendering unlawful wars which States, fully conscious of the moral and political implications and risks of their action, honestly declared to be undertaken in repelling a danger, actual or threatened, to their vital interests. It would be immaterial that, under this interpretation, discretion in the exercise of the right of self-defense would be subject to the general legal requirement of good faith in the performance of treaty obligations.

Various

systems of law contain provisions which expressly refer to the requirement of good faith. It is the elimination of any objective legal authority endowed with the competence to ascertain whether the duty of good faith has been complied with, which would largely be destructive of the legal object of the Treaty so interpreted.

Professor Lauterpacht himself, however, is of the opinion that there is nothing in the declaration or reservations referring to the Pact for Renunciation of War, and concerning the right of self-defense, which necessitates the assumption that the signatories of the Treaty intended to adopt this interpretation which would deprive the Treaty of most of its legal value. He says:

> "It is possible, perhaps probable, that the intention was merely to reaffirm a principle necessarily valid without any express declaration, namely, that implied in the first-mentioned interpretation of the non-justiciability of the right of self-defense."

This may be so; or from what has been said of the nature of this right the States might have thought otherwise. We are not much concerned with the question what should or could have been done. <u>If, as a matter of fact, the question was kept to be determined by the State concerned, the value of the Pact must be appraised with reference to this fact</u>, and not with reference to what the fact might have been. Even if the Parties did so under a misapprehension or misconception of the scope of self-defense, it is not open to us to go behind it so far as the effect of the Pact is concerned. The prosecution in the case before us very fairly admitted in its summation that "when the Kellogg-Briand Pact was signed,

it was stipulated that it did not interfere with the right of self-defense, and that each nation was to be the judge of that question."

In my opinion, it would not be correct to say that the parties to the Pact intended to reserve for their own judgment only the question of immediate action. The parties themselves never understood the Pact in that way, and, I believe, Mr. Kellogg himself made it amply clear what the Pact was intended by the parties to mean in this respect.

Professor Lauterpacht points out the principal difficulty to be that there is no machinery provided in the Pact for a legal regulation of the recourse to self-defense. Such machinery exists in the Covenant of the League of Nations. According to him, the Council and the Assembly of the League provide a possibility for evolving not only a moral, but also a legal judgment on the observance of the provisions of the Covenant as to recourse to war. It should, however, be remembered that the League of Nations was not an organization for all nations, and the organization itself provided for withdrawal of nations from it. The United States was no party, and Japan withdrew and the U.S.S.R. became a member after her withdrawal. Further, covenants prior to the Pact of Paris had reference only to a procedure to be followed in coming to war; these did not affect the legality or otherwise of the war itself.

In interpreting the Pact, we must not in any way be influenced by the fact that we are called upon to interpret it in a case against a vanquished people. Our interpretation must be the same as it would have been had the question come before us prior to any decisive war. With international law still in its formative state, great care must be taken

that the laws and doctrines intended to regulate conduct between state and state do not violate any principles of decency and justice. History shows that this is a field where man pays dearly for mistakes. Those who feel interested in these trials, not for retaliation, but for the future of world peace, should certainly expect that nothing is done here which may have the effect of keeping the hatefire burning.

The function of law is to regulate the conduct of parties by reference to rules whose formal source of validity lies, in the last resort, in a precept imposed from outside.

Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the Sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.

The inquiry involved in the consideration of the question raised in the case before us is at the very start confronted with the doctrine of sovereignty. The same doctrine confronts us in our inquiry as to the question of limitation of the function of law in the settlement of international disputes.

The theory of the sovereignty of states may reveal itself in international law mainly in two ways:

First, as the right of the state to determine what shall be for the future the content of international law by which it will be bound,

Second, as the right to determine what is the content of existing international law in a given case.

As a result of the first:

1. A state is not bound by any rule unless it has accepted it expressly or tacitly.
2. In the field of international legislation, unanimity and not mere majority is essential.

The second aspect connotes that the state is to be the sole judge of the applicability of any individual rule to its case.

So long as the states retain this right in respect of any rule, that rule, in my opinion, does not become law in the ordinary sense of the term. Even if we choose to give it the name "law", it will only be so in a specific sense, and its violation leads us nowhere. Its violation does not become a crime for the simple reason that none but the alleged defaulter can say whether it has been violated.

The view I take of the legal effect of the Pact makes it unnecessary for me to consider the various adverse comments made on it. It is sometimes said that the Pact was designed to be a perpetual guarantor of the status quo and thus, by it, an unstable and unjustifiable status quo, was sought to be erected in 1928.

We need not proceed to examine these criticisms; perhaps they are correct. At least Mr. Justice Jackson of the U.S.A. in his summing up of the case against the German War Criminals at the Nuernberg Trial lent much support to this view by refusing to go behind the state of affairs in Europe existing in a certain specified year. He would not allow any justification to come in from any prior period. But these criticisms

have no bearing on the question before us. If otherwise law, such shortcomings as are propounded through these comments would not have changed the character of the Pact as law.

In order to introduce the conception of crime in international life, it is essential that there would be an international community brought under the reign of law. But, as yet, there is no such community.

The expressions "International Law" and "International Community" are both used in relation to the existing international life only in some specific sense.

I have elsewhere discussed the character of international community. No doubt there is such a community in a sense, but to say that it is a community under the reign of law is only to extend the meaning of both law and community so as to enable them to cover some strange fields.

Apart from the domain regulated by expressly accepted international obligations, there is no international community. As these obligations exist only in the limited sphere of the expressly recognized partial community of interests, the individual interests of each state must always remain the guiding consideration.

Modern international law was developed as a means for regulating external contacts rather than as an expression of the life of a true society.

Maine, writing before the necessity for an international constitutional system became evident, uses harsh language. He calls it an Eighteenth Century superstition, "a superstition of the lawyers' seized

upon and promulgated by philosophers, in their eagerness to escape from what they deemed a superstition of the priests".

It is the misfortune of the international lawyers, not their fault, that the confusions and perplexities of our time should have excited false hopes and led to a revival of superstition and even to the promulgation of what may not unfairly be described as substitute religions in legal wrappings.

On a careful consideration of the nature and the scope of the obligations assumed by the states under the Pact of Paris, I have arrived at the conclusion that the pre-existing legal position of war in international life remained unaffected. The only effect produced by the Pact is the possible influencing of the world opinion against the offending belligerent and thereby developing the law-abiding sentiment as between states.

However insignificant this effect may appear to some writers, men of very high position and authority attached much importance to it. Lord Parker of Waddington, one of the Lords of Appeal, in the debate of March 19, 1918, in the House of Lords on the League of Nations, remarked:

> "One thing only I fear, and that is that the movement in favor of the League of Nations runs some risk by reason of the fact that its advocates are in somewhat too great a hurry. They are devoting their attention to the details of the superstructure rather than to the stability of the foundation."

He was speaking on the schemes for an international tribunal and an international police force. After pointing out that the schemes were based upon a false analogy between municipal and international law, Lord Parker said:

> "Every sound system of municipal law, with its tribunal and organized police, is a creation of historical growth, having its roots far in the past.....if we attack that part of the problem at first, I have very serious fears that the whole structure that we are trying to build may fall about our ears. It is a very serious matter to ask great nations in the present day to agree <u>beforehand</u> to the arbitrament of a tribunal consisting of representatives of some two dozen or three dozen states, many of whom may be indirectly interested in casting their votes on this side or on that....."

He pointed out that the only sound course was to recognize that law-abiding sentiment as between states was still only in the embryonic stage. The right method of approach was to concentrate on mobilizing sentiment and opinion against war itself, as anti-social conduct, a crime in violence against the community. Professor Zimmern sums up the speech saying that on the basis of embryonic world citizenship, Lord Parker builds a structure more firmly grounded, if less imposing, than that of the legalists. It is the organization of the hue and cry and nothing more. This is a stage preceding the stage of reign of law and is one without which no reign of law is possible.

Some such consideration might have prevailed with the parties to the Pact of Paris which induced them to leave the Pact where it now stands. Perhaps this is all that was thought possible and advisable in the present rudimentary stage of the world community. Perhaps much expectation was based on the assumption that a country does not lightly throw away its fair fame - that national reputation is an asset that is generally high prized by modern states.

The possibility of influencing the world opinion one way or the other does not seem to be looked upon as a negligible factor in the present day international life. At least the nations seem to attach much value to this opinion and propaganda for this purpose is daily gaining in importance in that life.

It will be of some interest to notice in this connection what M. Briand himself said about this matter while welcoming the first

signatories of the Pact.

"It may be objected," Briand said, "that this pact is not practicable; that it lacks sanctions. But does true practicability consist in excluding from the realm of facts the moral forces, amongst which is that of public opinion? In fact, the state which would risk incurring the reprobation of all its associates in the pact would run the positive risk of seeing a kind of general solidarity, gradually and spontaneously directed against it, with the redoubtable consequence which it would soon feel. And where is the country, signatory to the pact, which its leaders would assume the responsibility of exposing to such a danger?"

Vide Ex. 2314A in this case.

The same view of its sanction was taken in 1929, by Mr. Stimson, the then Secretary of State of the United States of America, in a statement made public in which he denied the British argument that as between the Signatory States 'there has been in consequence a fundamental change in the whole question of belligerent and neutral rights', and declared that "its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it."

I would now take up the remaining question in relation to the Pact, namely, whether, though the Pact of Paris did not declare any war to be a crime, its effect was to demand justification for a war in international life and thus to render any war that would not be justifiable a crime or an illegal thing by its very nature.

This is Lord Wright's view and it requires a serious consideration.

As I understand him, Lord Wright wants to say that as soon as by the Pact of Paris the signatory nations renounced war as an instrument of national policy, it no longer remained within the right of any nation to wage any war; war as a right was thus banished from international life.

If after this any nation should think of war, it must justify its action. Otherwise the nation commits a crime, a war by its very nature involving criminal acts. A war can be justified only if it is necessitated by self-defense. Hence an aggressive war being a war which is not in self-defense, is unjustifiable and consequently a crime.

Perhaps this would have been so had the Pact been unqualified by any reservation. The whole difficulty is that the Pact of Paris by leaving the question what is war in self-defense to be determined by a Party itself, subject only to the risk of an adverse world opinion, rendered its effect absolutely nugatory in this respect. In my opinion, when by any rule the Party itself is allowed to remain the sole judge of the justifiability of any action taken by it, the action still remains without the province of any law requiring justification and its legal character remains unaffected by the so-called rule.

As I have already noticed, Dr. Lauterpacht inclines to the view that the Pact should be taken to mean that war as an instrument of national policy is given up, subject only to the right of self-defense. The party claiming this right may take action on the strength of his own judgment, but the existence or otherwise of this right is justiciable by others. This is also the contention of the Prosecution in the present case.

Similar seems to be the opinion of Mr. Quincy Wright. After pointing out how in the earlier ages the concept that war is a suitable instrument of justice prevailed subject only to certain limitations upon the application of this concept, Mr. Wright says:

"The covenant with hesitation, and the Pact of Paris with more firmness, proceed upon a different hypothesis -- that war is not a suitable instrument for anything except defense against war itself, actual or immediately threatened. Thus, under these instruments, the tests of "just war" have changed from a consideration of the subjective ends at which it is aimed, to a consideration of the objective conditions under which it is begun and is continued."

He points out how with the post-war efforts at world organization, the *ius ad bellum* becomes the predominating feature of international law, with a concept which no longer attempts to distinguish between the justice or the injustice of the belligerent's cause, but instead, attempts to distinguish between the fact of aggression and the fact of defense.

I have already given my reason why I could not accept the view of Dr. Lauterpacht in this respect. Mr. Quincy Wright only says that the test provided is a consideration of the objective conditions instead of the subjective ends. But to whom is this consideration left? Mr. Wright does not give any decisive answer to this question. I have already given my view of this question and in my opinion this is the crucial question so far as the present matter is concerned.

The right of self-defense referred to by the various states in relation to the Pact of Paris is certainly not the same as the right of private defense given by a national system against criminal acts, as is contended by the Prosecution in the present case. It is the right inherent in every sovereign state and implied by the sovereignty of the state. It is not the right which comes into existence by some act of violence of an opponent. I have already quoted from authorities to show the scope of this right and its fundamental character. It is the very essence of sovereignty and so long as sovereignty remains the fundamental basis of international life, it cannot be affected by mere implication.

The proposition that the question of interpretation of a treaty is a matter justiciable in international law need not be denied. At the same time the right of self-defense or self-preservation is equally a fundamental matter in international life. Such a right cannot be said to have been limited in any way by implication. If the right was non-justiciable for the purposes of international law at the date of the Pact, it must be left still a non-justiciable matter. The Pact of Paris did not change the legal position in this respect.

There is certainly a great deal of difficulty in reconciling the uncompromising claims of national sovereignty in international relations with the growing necessities dictated by political developments in international relations and by demands of the growing public consciousness and opinion of the world. But the solution of this difficulty does not lie in staging trials of this kind only.

In international law, unlike municipal law, the general justiciability of disputes is no part of the existing law; it is in the nature of a specifically undertaken and restrictively interpreted obligation. Accordingly in international law, when the question arises whether any actual dispute is justiciable or not, the proper procedure is necessarily to inquire whether the contesting states have in regard to that particular dispute undertaken to accept the jursidiction of an international tribunal.

As far back as 1934 at a conference of the International Law Association held in Budapest views were expressed that the Pact of Paris had brought in a revolution in international law - not a revolution in the sense that war had ceased, - but that, while war waged as an instrument of national policy prior to 1928 was lawful, and gave rise to belligerent rights and neutral duties, such a war waged after 1928 had become unlawful and, consequently, could not give rise to rights and duties: ex injuria non oritum jus. Similar views were reiterated at the Fortieth Conference of the Association held at Amsterdam in 1938. Some of the international lawyers assented that no party to the Pact of Paris, which would violate the Pact, would have any rights whatever as a belligerent, as regards either the state attacked or neutrals, and that it would render itself in law liable for every injury done, whether to the state attacked and its members or to a neutral state and its members.

This view as to the effect of the Pact on the legal character of war was not shared by all and certainly did not in any way reflect the changes that might take place amongst nations in their practical regard for the Pact. If the effect of the Pact were to render war illegal depriving its author of belligerent rights there would be no duty of neutrality in any nation on the occasion of any such war.

Dr. Scheuner of Vienna examined the practice of nations with regard to neutrality since 1928, and the result of his examination was presented before the Conference at Amsterdam referred to above. The learned Professor traced the development of neutrality first since the foundation of the League of Nations up to 1928 and then since the Kellogg-Briand Pact. For the first period he considered how much regard the several nations paid to the Articles of the League Convention and summed up the result thus:

> "In practice . . . all the states have acted during this period as though the law of the neutrality had continued to exist."

He then cited instances in support of this view.

Coming to the second period Dr. Schuener found "that the governments since 1928 have in their treaties as well as in their political declarations and actions accepted the point of view that neutrality in its traditional sense is not incompatible with the obligations of the members of the League and of the signatories of the Briand-Kellogg Pact of

Paris. A number of governments have not hesitated to declare themselves neutral, to undertake obligations to remain neutral in the event of a war, or to declare that in the event of war they wish to remain neutral..."

Though not decisive, this throws some light on the question as to what changes took place amongst nations in their practical regard for the Pact. Nations do not seem to have behaved as if war after 1928 became an illegal thing. At least they preferred to recognize belligerent rights even in the case of a war in violation of the Pact. As I shall show later, both the U.S.A. and the U.K. entertained this view of the incidents of belligerency attaching to such a war. On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipments to China and Japan spoke of Great Britain as a "neutral government", and of the consequent necessity of applying the embargo to China and Japan alike. So, at that time Japan's war in China was not considered to be an illegal thing.

As has been pointed out by Mr. Finch:

(1) In January 1933, during the alleged aggression of Japan upon China in violation of the Nine Power Treaty, the covenant of the League of Nations and the Pact of Paris, Secretary of State Mr. Stimson, recommended that Congress "confer upon the President authority in his discretion to limit or forbid, in cooperation with other producing nations, the shipment of arms and munitions of war to any foreign state when in his judgment

such shipment may promote or encourage the employment of force in the course of a dispute or conflict between nations." No congressional action was taken upon this recommendation, but two years and a half later Congress passed the Neutrality Act of August 31, 1935, placing an embargo on the export of munitions of war to <u>every</u> belligerent state.

(2) This law was put into effect by President Roosevelt in the War of Italy upon Ethiopia.

(3) The Neutrality Act of 1935 was of a temporary character. It was replaced by permanent legislation in the Neutrality Act of May 1, 1937. This Act continued the embargo on the shipment of arms etc. to <u>all</u> belligerents . . .

(4) War in Europe started by the invasion of Poland on September 1, 1939.

Three weeks later, on September 21, President Roosevelt sent a message to Congress requesting the repeal of the embargo and a return to the "historic foreign policy" of the U.S. based on the "age-old doctrines of international law", that is "on the solid footing of real and traditional <u>neutrality</u>", which, according to John Quincy Adams "recognizes the cause of both parties to the contest as just - that is, it avoids all consideration of the merits of the contest."

Mr. Finch points out that in the light of this legislative history of the official attitude of the government of the U.S.

toward the interpretations of the pact, it is impossible to accept the thesis that a war in violation of the Pact was illegal in international law on September 1, 1939.

My own view is that war in international life remained, as before, outside the province of law, its conduct alone having been brought within the domain of law. The Pact of Paris did not come within the category of law at all and consequently failed to introduce any change in the legal position of a belligerent state or in the jural incidents of belligerency.

If the Pact of Paris thus failed to affect the legal character of war, either directly or indirectly, the next question is whether any category of war became crime or illegal thing in international life in any other way.

Dr. Glueck answers this question in the affirmative and says that a customary international law developed making an aggressive war a crime in international life.

For this purpose Dr. Glueck relies on the following data:

1. The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime.
2. It is familiar law in the international field that custom may, in the words of Article 38 of the statute of the Permanent Court of International Justice, be considered "as evidence of a general

practice accepted as law".

(a) All that is necessary to show is that during the present century a widespread custom has developed among the civilized states to enter into agreements expressive of their solemn conviction that unjustified war is so dangerous a threat to the survival of mankind and mankind's law that it must be branded and treated as criminal.

3. In addition to the Pact of Paris, the following solemn international pronouncements may be mentioned as the evidence of this custom and of this conviction:

(a) The agreements limiting the nature of the deeds permissible in the extreme event of war: The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 regulating the treatment of prisoners of war;

(b) The draft of a treaty of mutual assistance sponsored by the League of Nations in 1923, solemnly declared (Article 1) that aggressive war is an international crime, and that the parties would undertake that no one of them will be guilty of its commission.

(c) The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (Geneva Protocol) referring to aggressive war as crime.

(d) The declarations made at the Eighteenth Plenary meeting of the Assembly of the League of Nations held on September 24, 1927.

(e) The unanimous resolution, February 18, 1928, of the twenty-one American Republics at the Sixth (Havana) Pan American Conference declaring that "War of aggression constitutes an international crime against the human species".

(f) The preamble of the general convention signed by the representatives of all the republics at the international conference of American states on conciliation and arbitration held at Washington in December 1928, containing the statement that the signatories desired "to demonstrate that the condemnation of war as an instrument of national policy in their mutual relations set forth in the Havana Resolution constitutes one of the fundamental bases of inter-American relations . . ."

(g) The preamble of the Anti-war Treaty of Non-Aggression and conciliation signed at Rio de Janeiro, October 10, 1933, stating that the parties were entering into the agreement "to the end of condemning wars of aggression and territorial acquisitions . . ."

(h) Article 1 of the notable Draft Treaty of Disarmament and Security prepared by an American group and carefully considered by the Third Committee on Disarmament of the Assembly of the League of Nations 1924, providing that "The High Contracting Parties solemnly declare that aggressive war is an international crime . . ."

(i) Senator Borah's Resolution introduced on December 12, 1927.

As evidence of the suggested custom Dr. Glueck refers to a few solemn international pronouncements noticed above. These pronouncements, it may be observed, are mostly in agreements between states.

Agreements between states no doubt may have the significance attached to them by Dr. Glueck. Besides creating rights and duties inter-partes,

they may have the significance of being the pronouncement of some growing popular conviction and may thus ultimately contribute to the growth of a rule as an international customary law.

There is however some difficulty in determining the value of usages professing to be the groundwork of rules derogating from accepted principles. As has been pointed out by Hall, in some cases their universality may establish their authority; but in others, there may be a question whether the practice which is said to uphold them, though unanimous as far as it goes, is of value enough to be conclusive; and in others again it has to be decided which of two competing practices, or whether a practice claiming to support an exception, is strong enough to set up a new, or destroy an old, authority.

In the present case the alleged customary law, if established, would destroy a well-established fundamental law, namely, the sovereign right of each national state. Before the alleged custom was established this right was recognized as a fundamental one in the international system and the reason why this had to be recognized as an essential one still exists.

> "The interests protected by international law are not those which are of major weight in the life of states. It is sufficient to think of the great political and economic rivalries to which no juridical formula applies, in order to realize the truth of this statement. International law develops its true function

in a sphere considerably circumscribed and modest, not in that in which there move the great conflicts of interests which induce states to stake their very existence in order to make them prevail."

This is what Anzilotti says about the sphere of international law as it now stands. It may not be an accurate statement from the point of view of the actual content and scope of international law insofar as it wants to say that international law is concerned only with minor issues between states. The major questions of the existence of states and their rights as members of the international community certainly form the subject matter of that law. But even now questions of very great weight in the life of states are left <u>outside</u> the system and no state would agree to make them justiciable. It is an undeniable fact that such major questions of international relations have been regarded as pertaining to the domain of politics and not of law. <u>No customary law can develop in respect of them until they are brought within the domain of law</u>. So long as states persist in retaining their own right of judgment as to whether or not a certain requirement is necessitated by their self-defense, the matter remains outside the domain of law.

I have already quoted from the views expressed by Professor Quincy Wright in 1925 to show that in his view no war was crime up to that time.

In December 1927, Senator Borah in his Resolution before the United States Senate stated that until then "War between nations has always been and still is lawful institution, so that any nation may, with or

without cause, declare war against any other nations and be strictly within its legal rights." Dr. Glueck refers to this resolution but omits to notice this statement of the then existing law.

These statements, in my opinion, correctly give the law then existing. The question, therefore, is when did the alleged customary law develop? It did not certainly develop during the few months preceding the date of the Pact of Paris. In my opinion it never developed even after that date. Customary law does not develop only by pronouncements. Repeated pronouncements at best developed the custom or usage of making such pronouncements.

Before we can accept pronouncements referred to by Dr. Glueck as evidence of proposed customary rule we must remember that these pronouncements relate to the very foundation of the present international system which keeps such issues outside the domain of law.

National sovereignty is, even now, the very basis of the so-called international community. States are not only parties but also judges and executors in their own cases in relation to certain matters. The dangers of a too rigid application of the doctrine of national sovereignty and of the principles of "self-determination" are not even now fully appraised. It is still considered better to run the risk of sacrificing the directing influence of any central authority, than to allow its operations to be extended into the sphere of the internal activity of states.

The division of mankind into national states dates from the time when

the idea of the World Empire had disappeared, and all the states confronted one another independently, and without supreme authority.

The division was indispensable: Its justification had been that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavors of others who might be dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents and abilities to the utmost. It is the vocation of a national society to thoroughly develop every capability inherent in any people and its justification is its affording an opportunity for the profitable employment of everyone's activity everywhere.

A national society, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity and consequently is bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. National states thus cannot seek any absolute seclusion, nor strive after any absolute self-sufficiency; and in this sense the period of national states is also marked by the period of international society. But this international society is anything but a society under the reign of law.

No doubt the national state cannot be considered so definite and perfect a policy amongst the societies as to form the utmost boundary of their development. Every class of the population has its own onesidedness, it will remain stationary on a certain plane of education and knowledge

unless it receives impulses from without and feels the influence of foreign images and ideas; so that a constant exchange between its own development and between the assimilation of, and adaptation to, external ideas takes place. In this way nations have developed and are developing in state communities.

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international community, if it can be called a community at all, is and will continue to be the national sovereignty.

International organization has not, as yet, made anyprovision for full realization of this very essence of national sovereignty. Its realization is left to the power of the national state. There has not, as yet, been any organization for real international peace. Peace, hitherto, has been conceived of only as negation of war and nothing more. In such circumstances, so long as the application of "power" remains the fundamental principle, pronouncements like those referred to by Dr. Glueck would, in my opinion, fail to create any customary law.

But what are really these pronouncements? And before we attach any value to them we must not ignore the fact that whenever called upon to declare a war to be a crime states did not adequately respond.

The states have always been careful in retaining their right to decide what they would consider to be war in defense. None as yet is

prepared to make the question whether a particular war is or is not "in defense" justiciable. So long as a state retains its own decision as final in this respect, no war is made criminal.

After a careful consideration of all these facts and circumstances I am of the opinion that no international customary law could develop through the pronouncements referred to by Dr. Glueck and relied on by the prosecution.

The pronouncements at most only amounted to expressions of the conviction of persons making them. But these are not yet attended by any act on the part of any of the states. Custom as a source of law presupposes two essential elements:

1. The juristic sentiments of a people.
2. Certain external, constant and general acts by which it is shown.

It is indicated by identical conduct under similar external circumstances. The conduct of national states during the period in question rather goes the other way.

It may be that Dr. Glueck is thinking of "customary law" in a specific sense. It cannot be denied that in one sense customary law, statute and juristic law are all shoots from the same slip, namely, popular consciousness. In this sense the center of gravity of the development of all law -- not only of customary law -- can be placed into the legal consciousness, "the natural harmony of the conviction of a people, which

is a popular universal conviction ". For this purpose its emergence in usage is not essential to the origin of law. In this sense there need be no other prerequisites to the origination of customary law than a common popular conviction. We are, however, not much concerned with customary law in this specific sense. No doubt it has its own scientific value. But we are concerned with customary law in a sense in which it becomes applicable by a judge. There are prerequisites to its applicability by the judge. Puchta was not concerned with such prerequisites in his scientific evaluation of customary law, but he recognized them: "But if we take prerequisites to mean something else, e. g. if we take it in the sense of a prerequisite to the application by the judge, to his acceptance of customary law, then that whereof we are speaking no longer is a prerequisite to customary law itself. In this case the question to be answered is: What must the judge take into account when a party litigant appeals to customary law or when for any other reason he is called upon to consult this source of law? What are the presuppositions under which customary law can actually be assumed to exist?"

There is thus a sharp distinction between the question as to the origin of customary law in the more popular conviction and as to its applicability by a court. There may be customary law in the sense that it exists in the conviction of the people; yet it may not be law applicable by a court because the prerequisites to its applicability by the court are lacking. Herein comes the usage which is wanting in the

present case. The people should not merely be conscious of their law but they must live their law, -- they must act and conduct themselves according to it.

This living according to law is required not as a mere form of manifestation but also as a means of cognition of customary law. When the conduct of the nations is taken into account the law will perhaps be found to be that only a lost war is a crime.

I may mention here in passing that within four years of the conclusion of the Pact there occurred three instances of recourse to force on a large scale on the part of the signatories of the Pact. In 1929 Soviet Russia conducted hostilities against China in connection with the dispute concerning the Chinese Eastern Railway. The occupation of Manchuria by Japan in 1931 and 1932 followed. Then there was the invasion of the Colombian Province of Leticia by Peru in 1932. Thereafter, we had the invasion of Abyssinia by Italy in 1935 and of Finland by Russia in 1939. Of course there was also the invasion of China by Japan in 1937.

Dr. Lauterpacht points out that it is arguable that a war or a succession of wars between a considerable number of important signatories would remove altogether (i.e. also for other signatories) the basis of a Pact in which a substantial degree of universality may appropriately be regarded as being of the essence. But we may leave this question alone for the present.

In my opinion, no category of war became illegal or criminal either by the Pact of Paris or as a result of the same. Nor did any customary law develop making any war criminal.

Mr. Comyns Carr for the prosecution appealed to what he characterized as the very foundation of international law and invited us to apply what he called well-established principles to new circumstances. He said:

> "International law like the legal system of . . . all of the English speaking countries . . . consists of a common law and a more specific law, which in the case of individual countries is created by statute, and in the case of international law is created by Treaties. But the foundation of international law, just like the foundation of legal system . . . of English speaking countries is, common law. That is to say, it is the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances. It is unquestionably within the power, and, ... the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case."

I would presently consider how for this so-called foundation of international law will carry us towards declaring any category of war as having been a crime in international life. The context in which Mr. Carr made this appeal only goes to indicate that the well-established principle referred to by him relates to a "nomenclature". Mr. Carr is there dealing with the defense contention as to the import of the expression "war criminal" as used in the Potsdam Declaration. He refers to Article 227 of the Treaty of Versailles as "laying down the principle and applying what was already a well-established principle to new circumstances". The Article in question of the Treaty of Versailles is the one wherein "the Allied and Associated Powers" proposed "publicly to arraign" the German Emperor "for a supreme offence against international morality and the sanctity of treaties". The only principle or principles that can possible be gathered from this Article seem to be:

1. That the Allied and Associated Powers may place on trial the head or heads of the defeated state.
2. That such powers may constitue a Tribunal for such trial.
3. That such a Tribunal is to be guided by the highest motives of international policy, with a view to vindicating the solemn obligation of international undertakings and the validity of international morality.

As I read the Article it contains no principle making the war a crime or obliging the tribunal set up by the victors to declare such a war illegal or criminal.

Analogous to Mr. Carr's appeal seems to be the appeal of Lord Wright to the progressive character of international law and to the creative power of an international tribunal. Similarly there have been appeals to the developed character of international community, to the laws of nature as also to a widening sense of humanity.

Lord Wright says:

"It may be said that for ages it has been assumed, or at least taken for granted in practice, among the nations that any state has the right to bring aggressive war as much to wage war in self defense and that the thesis here maintained is revolutionary. In fact, the evil or crime of war has been a topic of moralists for centuries. It has been said that 'one murder makes a felon, millions a hero'. The worship of the great man, or perhaps the idea of sovereignty, paralyses the moral sense of humanity. But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized

mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. I am convinced that International Law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is, for the reasons which I have briefly and imperfectly here sought to advance. I may add to what I have said, that the comparatively minor but still serious outrages against the Pact, such as the rape of Manchuria in 1931 and the conquest of Abyssinia in 1935 were strongly reprobated as violations of the Pact of Paris; indeed though the Pact did not provide for sanctions, the latter outrage provoked certain sanctions on the part of some nations. In addition there is a strong weight of legal opinion in favour of the view here suggested."

He then proceeds: "An International Court, faced with the duty of deciding the question, would do so somewhat on the same principles as a municipal Court would decide the question whether a disputed custom has been proved to exist. It would do so on the materials before it. These materials are of course different in character where the dispute is whether the existence of a rule of International Law has been established as part of the customary law between the nations. I have indicated my view as to what such materials are. A Court would also seek to harmonize

the customary rule with the principles of logic of morality and of the conscience of civilized mankind. The law merchant (to compare small things with great) existed as law enforceable by its proper courts before it was accepted as part of the national legal system. The Court would bear in mind that time and experience bring enlightenment and that obsolete ideas and prejudices become outworn."

The reference to the progressive character of international law is really an appeal to the ultimate vital forces that bring about the development of legal institutions.

The observations made in this connection are very valuable contributions to a theory of the sources of law and certainly are of permanent value as such. They expose the real worksho of the law.

No doubt it is the function of a theory of the sources of law to discover the vital forces that bring about the development of legal institutions. But these are yet to pass through some adequate social process in order to develop into law. I do not consider trials of the defeated nationals to be the just and adequate social process of this purpose. At least in international life, in developing legal relations, the feeling of helplessness should not be allowed to serve as the basis. A mere Might's grip cannot long elude recognition as such and pass for Law's reach.

Like Lord Wright, Professor Wright, Mr. Trainin and Dr. Glueck also appeal to this progressive character of the law and to a widening sense of humanity.

According to Dr. Glueck the time has arrived in the life of civilized nations when an international custom should be taken to have developed

to hold aggressive war to be an international crime. He insists that an issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lead.

Mr. Trainin relies principally on the Moscow Proclamation of October 30, 1943 and emphasizes that this marks a new era of development of social life in international community. According to him to facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a new system of international law, and, as an indissoluble part of this system, to direct the conscience of nations to the problem of criminal responsibility for attempts on the foundations of international relations.

In my view, international society has not yet reached the stage where the consequences contemplated by these learned authors would follow.

Even after the formation of the League of Nations we had only a group of coordinated states with their sovereignty intact. The best account of the developments of international society is given by Professor Zimmern in his book entitled "The League of Nations and the Rule of Law". Dr. Schwarzenberger also takes the same view.

"People learned from the war only "to substitute the notion of organic association between independent, self-governing and cooperatively minded peoples." Democracy and centralization do not, it is said

belong to the same order of ideas. They are, in essence, as incompatible as freedom and slavery. The League of Nations thus "while morally a great effort of faith was administratively a great effort of decentralization."

It was simply a system of international cooperation.

"The high contracting parties in order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agreed to this Covenant of the League of Nations."

No international community of any higher order came into being. The League showed particularly scrupulous regard for national sovereignty and laid special emphasis on such sovereignty by adopting the principle of unanimous vote. National sovereignty and national interest continued to play the fundamental part in this organization.

There has no doubt been, since the outbreak of the World War, a feeling on the part of many writers that there should be some restatement of the fundamental principles of international law in terms of international life.

At the same time it must be said that this is yet to happen. The

international organization as it now stands still does not indicate any sign of abrogation of the doctrine of national sovereignty in the near future.

As to the "Widening sense of humanity" prevailing in international life, all that I can say is that at least before the Second World War the powerful nations did not show any such sign. I would only refer to what happened at the meeting of the Committee drafting resolutions for the establishment of the League of Nations when Baron Makino of Japan moved a resolution for the declaration of the equality of nations as a basic principle of the League. Lord Robert Cecil of Great Britain declared this to be a matter of highly controversial character and opposed the resolution on the ground that it "raised extremely serious problems within the British Empire." The resolution was declared lost: President Wilson ruled that in view of the serious objections on the part of some it was not carried.

Coupled with this, if we take the fact that there still continued domination of one nation by another, that servitude of nations still prevailed unreviled and that domination of one nation by another continued to be regarded by the so-called international community only as a domestic question for the master nation, I can not see how such a community can even pretend that its basis is humanity. In this connection I cannot refrain from referring to what Mr. Justice Jackson asserted in his summing up of the case at Nurenberg. According to him, a preparation by a nation to dominate another nation is the worst of

crimes. This may be so now. But I do not see how it could be said that such an attempt or preparation was a crime before the Second World War when there was hardly a big power which was free from that taint. Instead of saying that all the powerful nations were living a criminal life I would prefer to hold that international society did not develop before the Second World War so as to make this taint a crime.

The atom bomb during the Second World War, it is said, has destroyed selfish nationalism and the last defense of isolationism more completely than it razed an enemy city. It is believed that it has ended one age and begun another -- the new and unpredictable age of soul.

"Such blasts as leveled Hiroshima and Nagasaki on August 6 and 9, 1945, never occurred on earth before -- nor in the sun or stars, which burn from sources that release their energy much more slowly than does Uranium." So said John J. O'Neill, the Science Editor, New York Herald Tribune. "In a fraction of a second the atomic bomb that dropped on Hiroshima altered our traditional economic, political, and military values. It caused a revolution in the technique of war that forces immediate reconsideration of our entire national defense problem".

Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs". Perhaps these explosives have awakened within us the sense of unity of mankind, -- the feeling that:

"We are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed or color, by bonds which

have been fused unbreakably in the diabolical heat of those explosions."

All this might have been the result of these blasts. But certainly these feelings were non-existent at the time when the bombs were dropped. I, for myself, do not perceive any such feeling of broad humanity in the justifying words of those who were responsible for their use. As a matter of fact, I do not perceive much difference between what the German Emperor is alleged to have announced during the First World War in justification of the atrocious methods directed by him in the conduct of that war and what is being proclaimed after the Second World War in justification of these inhuman blasts.

I am not sure if the atom bombs have really succeeded in blowing away all the pre-war humbugs; we may be just dreaming. It is yet to be seen how far we have been alive to the fact that the world's present problems are not merely the more complex reproductions of those which have plagued us since 1914; that the new problems are not merely old national problems with world implications, but are real world problems and problems of humanity.

There is no doubt that the international society, if any, has been taken ill. Perhaps the situation is that the nations of the international group are living in an age of transition to a planned

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society.

But that is a matter for the future and perhaps is only a dream.

The dream of all students of world politics is to reduce the complex interplay of forces to a few elementary constants and variables by the use of which all the past is made plain and even the future stands revealed in lucid simplicity. Let us hope it is capable of realization in actual life. I must, however, leave this future to itself with the remark that this future prospect will not in the least be affected even if the existing law be not strained so as to fix any criminal responsibility for state acts on the individual authors thereof in order to make the criminality of states more effective. The future may certainly rely on adequate future provisions in this respect made by the organizers of such future.

During and after the present war, many eminent authors have come forward with contributions containing illuminating views on the subject of "War Criminals - their Prosecution and Punishment". None of these books and none of the prosecutions professed to be prompted by any desire for retaliation. Most of these contributors claim to have undertaken the task because "miscarriage of justice" after World War I shocked them very much, particularly because such failure was ascribable to the instrumentality of jurists who deserved the epithets of

being "stiff-necked conceptualists," "strict constructionists," and men "afflicted with an ideological rigor mortis." These Jurists, it is said, by giving the appearance of legality and logic to arguments based on some unrealistic, outworn and basically irrelevant technicality caused the greatest confusion in the minds of ordinary laymen with regard to the problems of war criminals. These, it is claimed, were the chief present-day obstacles to the just solution of the problem and these authors have done their best to remove such obstacles and to supply "not a mere textbook on some remote technically intricate phrase of a branch of law," but "a weapon with which to enforce respect for the tenets of international law with its underlying principles of international justice."

Some of these authors have correctly said that law is not merely a conglomeration of human wisdom in the form of rules to be applied wherever and whenever such rules, like pieces in a jigsaw puzzle, may fit in. "Law is instead a dynamic human force regulating behaviour between man and man and making the existence and continuity of human society possible."

Its chief characteristic is that it stems from man's reasonableness and from his innate sense of justice.

"Stability and consistency are essential attributes of rules of law, no doubt,"

says such an author:

"Precedent is the sine qua non of an orderly legal system.

But one must be certain that the precedent has undoubted relevancy and complete applicability to the new situation or to the given set of facts. And if applicable precedent is not available, a new precedent must be formed, for at all times law must seek to found itself on common sense and must strive for human justice."

With all respect to these learned authors, there is a very big assumption in all these observations when made in connection with international law. In our quest for international law, are we dealing with an entity like national societies completely brought under the rule of law? Or, are we dealing with an inchoate society in a stage of its formation? It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made will not be the law safeguarding the peace-loving, law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted Society of Nations, will shake the very foundation of any future international society.

Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social coexistence with regard to the activity of the community and of the individual. Law stems from a man's reasonableness and from his innate sense of justice. But what is that law? And is international law

law of that character?

A national society, as I have pointed out above, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity, and is thus bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. A national state cannot therefore seek any absolute seclusion, or strive after an absolute self-sufficiency. In this sense, from the very moment of the origin of national states, international society also came into existence. This also accounts for the circumstance that the period of national states is also marked by the development of the system of international law.

Yet it is difficult to say that this international society is a society under the reign of law. I shall quote extensively from Professor Zimmern, where he very ably and truly characterizes international society.

> "For anyone", says Professor Zimmern, "trained in the British tradition, the term International Law embodies a conception which is, at its best, confusing and at its worst exasperating. It is never law as we understand it, and it often, as it seems to us, comes dangerously near to being an imposter, a simulacrum of law, an attorney's mantle artfully displayed on the shoulders of arbitrary power.
>
> "A satisfactory political system, in British eyes, is the offspring of a harmonious marriage between law and force.....

It is the essence of what we call British Constitutionalism. By it is ensured working of two processes, separable in theory for the analysis of the political scientist, but inextricably blended in practice, the observance of the law, or, to use the language of post war controversy, 'sanctions' and 'peaceful change'. Thus the judge, the legislator and the executive throughout its range, from the Prime Minister to the policeman, form interdependent parts of a single system.

"This constitutional system does not function because it is wound up from outside or impelled from above. Its driving force is supplied from within. It derives its validity from consent; and its energy is constantly renewed and refreshed by contact with public opinion. It is the popular will which the legislature is seeking to embody in appropriate statutes. It is the popular will which the judge is engaged in interpreting and the policeman in enforcing. All these are performing what is felt to be social function. They are adapting the organization of the state, which is the most continuous and potent agency of social service in the community to the permanent and changing needs of society,

"Seen as a part of this larger whole, law may be defined as social habit formulated into regulations. When these regulations, if any part of them, are felt to be anti-social, no longer in accordance with the general sentiment of the day, or

even repugnant to it, they are changed. Thus the notion of law and the notion of change, so far from being incompatible, are, in fact, complementary. The law is not a solid construction of dead material, a fixed and permanent monument, it is an integral part of a living and developing society created and transmitted by men.....

"Turn now to international law, what do we find? A situation almost exactly the opposite of what has just been described.

"To begin with, where are we to look for the rules and obligations of international law? We shall not find them embodied in the habits of the will, still less in the affections, of a society.

"International law, in fact, is a law without a constitution. And since it is not grounded in a constitution it lacks the possibility of natural growth. Unconnected with a society, it cannot adjust itself to its needs. It cannot gather itself together by imperceptible stages into a system.....

"The reason for this is very simple. The rules of international law, as they existed previous to 1914, were, with a few exceptions, not the outcome of the experience of the working of a world society. They were simply the result of the contacts between a number of self-regarding political units - stars whose courses, as they moved majestically through a neutral firmament, crossed one another from time to time. The multi-

plication of these external impacts or collisions rendered it mutually convenient to bring their occasions under review and to frame rules for dealing with them."

In my judgment this is where the international law stands even now and will stand unless and until the political units agree to yield their sovereignty and form themselves into a society. As I have shown elsewhere, the post war United Nations Organization is certainly a material step towards the formation of such a society. I know that as a judge, it is not for me to preach the need for a wider social consciousness or to propound practical solutions for the problems involved in the material interdependence of the modern world. Yet the international relation has reached a stage where even a judge cannot remain silent though the task that is given him is only one of formulation, classification and interpretation. I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. "The individual human being - his welfare and the freedom of his personality in its manifold manifestations - is the ultimate subject of all law. A law of nations effectively realizing that purpose would acquire a substance and a dignity which would go far toward assuring its ascendency as an instrument of peace and progress." This certainly is to be done by a method very different from that of trial of war criminals from amongst the vanquished nations. An international organization of the kind recommended by Dr. Lauterpacht would not permit a dominating

foreign power to claim its dealings with the dominated nation as its "domestic affairs" outside the jurisdiction of the organization.

Inducements to the exercise of creative judicial discretion in the field before us do not inspire much enthusiasm in me. The decision would not create anything new: It would only create precedent for a victor in war to bring the vanquished before a tribunal. It can never create precedent for the sovereign states in general unless such states voluntarily accept such limitations. Certainly this is open to them to do by treaties or conventions.

I am told that if the persons in the position of the present accused are not made responsible for acts such as are alleged against them, then the Pact of Paris brings in nothing useful. I am not sure whether that is the position. Law, no doubt, ends by being what it is made to be by the body which applies it to concrete situations: Yet the body called upon to apply it should not force it to be what it is not, even at the risk of missing the most attractive opportunity for contributing towards the development of a temptingly significant concept of international law, - I mean "the legal concept of the crime against peace".

I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place. In an organization like that it would certainly be most conducive to the benefit of the community as a whole and to the necessity of stable and effective legal relations between its members to chastize activities like those alleged in the present case. But, until then it serves no useful purpose. When the fear of punish-

ment attendant upon a particular conduct does not depend upon law but only upon the fact of defeat in war, I do not think that law adds anything to the risk of defeat already there in any preparation for war. There is already a greater fear -- namely, the power, the might of the victor. If law is not to function unless the violating party succeeds in violating the law effectively and then is overwhelmed by power or might, I do not find any necessity for its existence. If it is really law which is being applied I would like to see even the members of the victor nations being brought before such tribunals. I refuse to believe that had that been the law, none of the victors in any way violated the same and that the world is so depraved that no one even thinks of bringing such persons to book for their acts.

I cannot leave the subject without referring to another line of reasoning in which reference is made to the various doctrines of natural law and a conclusion is drawn therefrom that "the dictates of the public, common, or universal conscience profess the natural law which is promulgated by man's conscience and thus universally binds all civilized nations even in the absence of the statutory enactment". A wealth of authority, both ancient and modern, is requisitioned to establish that public international law is derived from natural law. The authorities cited for this purpose range from Aristotle to Lord Wright. That this natural law is not a mere matter of history but is an essential part of the living international law is sought to be established by reference to the preamble of the Hague Convention of 1907 (Convention

No. 4) as also to the text of the American Declaration of Independence. The Hague Convention in its preamble, it is pointed out, refers to the laws of humanity and the dictates of the public conscience. The American Declaration of Independence refers to "the laws of nature and nature's God". From these and various other authorities it is concluded "that public international law" is based on natural law: It is said "the principles of international law are based on the very nature of man and are made known to man by his reason, hence we call them the dictates of right reason. They are, therefore, not subject to the arbitrary will of any man or nation. Consequently, the world commonwealth of nations forms one natural organic, moral, juridical and political unity". It is further said, "From what has been said so far it follows that the world commonwealth must needs enjoy an inherent authority to enact positive law for the promotion of the common good. For, on the one hand, the dictates of right reason are only general provisions that must be applied and determined according to the particular circumstances of any given case. Thus, the positive legal enactments or agreements which govern international relations represent the political interpretations and applications of the general principles of the natural and moral law..... On the other hand, unified cooperation of all can only be obtained by issuing binding rules."

It is not for me to question the relevancy of this appeal to natural law. There may be deep-seated reason that in all ages and countries the idea of natural law, that is, one founded on the very reality of things

and not on the simple "placet" of the legislature has been cultivated. There have no doubt been fundamental divergencies in the doctrine of natural law. The relations between the dictates of natural justice and juridical norms have also been variously conceived, depending upon diverse speculative tendencies and historical phases. Often a wide and impassable separation arose between the two systems of determination, while at other times the difference seemed one of genus and species, or two views of the same object. These divergencies however should not prevent the recognition of the deep-seated unity of the conception containing all the characteristics of a psychological necessity. What is a source of difficulty for science does not cease to exist in reality; and it would be a vain illusion to ignore a need because we cannot satisfy it.

The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past. Indeed "for many the term 'natural law' still has about it a rich, deep odor of the witches' caldron, and the mere mention of it suffices to unloose a torrent of emotions and fears." It would certainly be unjust and irrational, if, under the pretext of correcting errors and omissions, this hostility is carried to the destruction of the very object of these systems.

We must not however forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of

juridicity. Perhaps its claim that the realization of its doctrines should constitute the aim of legislation is perfectly legitimate. But I doubt if its claim that its doctrines should be accepted as positive law is at all sustainable. At any rate in international law of the present time such ideal would not carry us far. I would only like to refer to Hall's International Law, Eighth Edition, Introductory Chapter where the learned author discusses what international law consists in and gives his views as to its nature and origin. The learned author gives in the footnote the fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion and assigns two weighty reasons for discarding this theory of natural law as a guide in determining what the law is at present. His conclusion is given in the following terms:

> "States are independnet beings subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin or else they must be agreed as to the general principles by which they are to be governed . . . Even if a theory of absolute

right were universally accepted the measure of the obligations of a state would not be found in its dictates but in the rules which are received as positive law by the body of states . . . However useful . . . an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer...it can only be source of confusion and mischief when it is regarded as a test of the legal value of existing practices."

I respectfully agree with this view and therefore do not consider that the various theories of natural law should detain me any longer. I should only add that the international community has not as yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good".

International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested. It is only when such group living is agreed upon, the conditions required for successful group life may supply some external criteria that would furnish some standard against which the rightness or otherwise of any particular decision can be measured.

In my judgment no category of war became a crime in international life up to the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory

of the international legal philosophers. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life. No war became an illegal thing in the eye of international law as a result of this Pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war a crime. International community itself was not based on a footing which would justify the introduction of the conception of criminality in international life.

It is not quite relevant for the purposes of this case to examine whether there has been any development of international law in this respect since the second world war. Even if law has since developed so as now to make such a war a crime, that in my opinion would not affect the present accused.

Apart from the suggested progress of international law by its own inherent nature two possible sources of development of the law during this period seem to have been suggested: Mr. Trainin suggested the Moscow Declaration of 1943 and Dr. Glueck suggested the will of the victor and its product, the Charter. I have already expressed my views why I consider that if there was any such attempt on the part of the victor nations it would fail to produce the desired effect. The same principle would apply to the suggested consequences of the Moscow Declaration. If this declaration has really started any new era in international life and if, as a result, any new rule of law has come

into being, I do not see any principle of justice that would entitle us to invoke the aid of any such ex post facto development in condemning the long-past acts of the accused.

After the answer that I give to the question whether war of the alleged category became crime in international life, it becomes somewhat unnecessary for me to discuss whether the individuals functioning as alleged here would incur any criminal responsibility in international law. As, however, much has recently been said about this matter by various learned jurists and politicians I prefer to notice these authorities and express my view of the question on the assumption that aggressive war, whatever it is, is crime in international life.

The indictment in this respect alleges that the accused planned and prepared for aggressive war in their capacity as leaders, organizers, etc. of the Japanese Government. In other words their act in this respect would ordinarily be an act of state.

As regards the individual responsibility in respect of acts of state, Mr. Keenan has very rightly emphasized that this question is the crucial one. The question whether those individuals committed any international crime by working the constitution of the government of their nation is really of grave moment in international relations. The answer to the question would largely depend upon what answer we can give to the other questions, namely, whether in their international relations the covenanting nations agreed to limit their sovereign right of non-intervention from outside in the matter of working their own

constitution and whether in any event they can be found as having yielded to the common will of all so as to hand over to an international tribunal the persons entrusted with the working of their own machinery of government for having worked the same badly. The question is, not how badly they behaved and thus brought their own nation to grief, but whether thereby they made themselves answerable to the international society.

The question of the responsibility of the authors of the First Great War was made the subject of an elaborate report by a commission of the Peace Conference. This report is printed in English by the Carnegie Endowment for International Peace. The Commission reported that:

1. The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria;
2. It was the result of acts deliberately concocted in order to make it unavoidable.

3. That the war was carried on by these powers by barbarous methods in violation of:

(a) The established laws and customs of war;

(b) The elementary laws of humanity.

Yet, while dealing with the question of personal responsibility of individual offenders against the laws of nations, the Commission could not recommend their trial.

As to the acts which provoked the war, although in the opinion of the Commission the responsibility could be definitely placed, it advised that the authors thereof should not be made the object of criminal proceedings. The same conclusion was arrived at in respect of the violation of the neutrality of Belgium and Luxembourg. Nevertheless, in view of the gravity of the outrages upon the principles of the law of nations and upon international good faith, it was recommended that they should be made the subject of a formal condemnation by the Peace Conference.

It was recommended that as to the acts by which the war was provoked it would be right for the Peace Conference in a matter so unprecedented to adopt special measures and even to create a special organ in order to deal as they deserve with the authors of such acts. Finally, it was suggested that for the future it was desirable that penal sanctions should be provided for such grave outrages against the elementary principles of international law.

The two American members of the Commission, Messrs Lansing and Scott, who dissented from certain conclusions and recommendations of the

Commission, declared that they were as earnestly desirous as the other members that those persons responsible for causing the war and those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal, and that the perpetrators should be held up to the execration of mankind, but that they did not consider that a judicial tribunal was a proper forum for the trial of offenses of a moral nature. They objected to the proposal of the majority to place on trial before a court of justice persons charged with having violated the principles of humanity or the "laws of humanity". They also objected to the "unprecedented proposal to put on trial before an international criminal court the heads of states not only for having directly ordered illegal acts of war but for having abstained from preventing such acts".

Mr. Quincy Wright, writing in 1925 on the "Outlawry of War" pointed out:

> "The main difficulty found by the commission was that international law did not recognize war-making as positively illegal; but even if it had, there would be doubt whether any particular individual, even a sovereign, could be held liable for the act of the state."

According to the learned author:

"With the complexity of modern state organization, it would be difficult to attribute responsibility for declaring war to any individual or group of individuals. There are few absolute monarchs. Ministers act under responsibility to legislatures which are in turn responsible to electorate. In an age of democracies an effort to hold individuals responsible for a national declaration of war would frequently involve an indictment of the whole people. This practical difficulty coupled with the theory of state independence has brought about recognition of the principle of state responsibility in international law, with a consequent immunity from international jurisdiction of individuals acting under state authority."

Judge Manley O. Hudson, in his treatise entitled "International Tribunals, Past and Future" published in 1944, while dealing with the question of "The Proposed International Criminal Court" in Chapter 15, says:

"International law applies primarily to states in their relations inter se. It creates rights for states and imposes duties upon them, vis-a-vis other states. Its content depends very largely upon the dispositions of interstate agreements

and upon deductions from the practices of states."

According to the learned Judge this is why it reflects but feebly a community point of view and why the halting progress made in international organization has not facilitated its protection of community interests as such. "Historically", says the learned Judge, "international law has not developed any conception of crimes which may be committed by states. From time to time certain states have undertaken to set themselves up as guardians of community interest and have assumed competence to pronounce upon the propriety of the conduct of other states. Yet, at no time in history have condemnations of states' conduct, whether before or after the event, been generally formulated by legislation for international crimes. Only in quite recent times have official attempts been made to borrow the concept of criminality from municipal law for international purposes. In the abortive Geneva Protocol of 1924 'a war of aggression' was declared to be 'an international crime' and this declaration was repeated by the assembly of the League of Nations in 1927, and by the Sixth International Conference of American states in 1928; no definition was given to the terms, however, though the 1924 Protocol was designed to ensure 'the repression of international crimes'. At no time has any authoritative formulation of international law been adopted which would brand specific conduct as criminal, and no international tribunal has ever been given jurisdiction to find a state guilty of crime."

Coming to the question of individual responsibility, Judge Hudson says:

"If international law be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal law. It was at one time fashionable to refer to pirates as enemies of all mankind and to piracy as an offense against the law of nations." The United States Constitution of 1789 empowered Congress to define and punish "piracies and felonies committed on the high seas and offenses against the law of nations". Unanimity does not obtain upon the meaning to be given to these terms, but modern opinion seems to be inclined to the view that a broad category of armed violence at sea is condemned by international law as piratical conduct, with the consequence that any state may punish for such conduct and that other states are precluded from raising the objections which might ordinarily be advanced against the assumption of jurisdiction."

He then points out that:

"It is in this sense that the conception of piracy as an offense against the law of nations has been seized upon, by <u>way of analogy</u>, for the service of other ends. Various treaties of the Nineteenth Century provided for the possibility of states punishing persons engaged in the slave trade as pirates . . . "

The learned Judge then points out

"Despite the employment of such analogies no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals. States have jealously guarded their own functions in the repression of crime, and differences in national and local outlooks and procedures have precluded the development of an international or supranational criminal law. . .

He concludes the topic by saying:

"Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or of individuals."

It may be noticed in this connection that whenever in international relations it has been considered desirable to control the conduct of individuals, care has been taken to make adequate provision for the same in the treaty itself.

Numerous treaties of recent date contain condemnations of the anti-social conduct of individuals and the states parties agree to adopt their national penal laws to serve common ends.

The treaties do not directly apply to individuals, and their impact on individual conduct will depend upon each state's performance of its treaty obligations by the incorporation of the provisions into

national law or otherwise.

This view was clearly expressed in the 1899 and 1907 Hague Convention on the laws and customs of war on land, by which the states parties undertook to give their armed forces instructions conforming to regulations annexed to the Convention. Neither of the Conventions operated directly on individuals; but the 1907 Convention provided that a state would be responsible for acts committed by persons belonging to

its armed forces in violation of the provisions of the regulations and would be liable for indemnities. The same view was taken in the numerous suggestions which were made for dealing with violations of the 1929 Geneva Convention on the treatment of sick and wounded soldiers, but Articles 29 and 30 of the Convention are not clear on the point.

This is how infringement on national prerogatives in this field has always been avoided.

An apparently contrary view is expressed by Professor Hans Kelsen of the University of California who says:

"When the Second World War broke out, the legal situation was different from that at the outbreak of the First World War. The Axis Powers were contracting parties to the Kellogg-Briand Pact by which resorting to a war of aggression is made a delict; and Germany has, by attacking Poland and Russia, violated, in addition to the Kellogg-Briand Pact, non-aggression pacts with the attacked states. Any inquiry into the authorship of the Second World War does not raise problems of extraordinary complexity. Neither the questio juris nor the questio facti offers any serious difficulty to a tribunal. Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II. Insofar as this is also a question of the constitutional law of the Axis Powers, the answer is simplified by the fact that these states were under more or less

dictatorial regimes, so that the number of persons who had the legal power of leading their country into war is in each case of the Axis States very small. In Germany it is probably the Fuehrer alone; in Italy, the Duce and the King; and in Japan, the Prime Minister and the Emperor. If the assertion attributed to Louis XIV "'Etat c'est moi" is applicable to any dictatorship, the punishment of the dictator amounts almost to a punishment of the state."

This is however, only apparently contrary, as will appear from what I have already quoted from Professor Kelsen elsewhere. The learned Professor prefaces the above statement thus:

> "If the individuals who are morally responsible for this war, the persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as the authors of the war shall be made legally responsible for the injured states, it is necessary to take into consideration that general international law does not establish individual, but collective responsibility for the acts concerned, and that the acts for which the guilty persons shall be punished are acts of state -- that is, according to general international law, acts of the government or performed at the government's command or with its authorization."

Professor Kelsen then proceeds to examine the meaning of the expression "act of state" and says:

> "The legal meaning of the statement that an act is an act of state is that this act is to be imputed to the state, not to an individual who has performed the act. If an act performed by an individual -- and all acts of state are performed by individuals -- must be imputed to the state, the latter is responsible for this act. . . If an act is to be imputed to the state and not to be imputed to the individual who has performed it, the individual, according to general international law, is not to be made responsible for this act by another state without the consent of the state whose act is concerned. As far as the relationship of the state to its own agents or subjects is concerned, national law comes into consideration. And in national law the same principle prevails; an individual is not responsible for his act if it is an act of state, i.e. if the act is not imputable to the individual but only to the state. . . The collective responsibility of a state for its own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government . . . has performed the act.

This is a consequence of the immunity of one state from the jurisdiction of another state." According to the learned Professor, "this rule is not without exceptions but any exception must be based on a special rule of customary or conventional international law restricting the former."

He then points out:

"In this respect there exists no difference between the head of state and other state officials . . . There is no sufficient reason to assume that the rule of general customary law under which no state can claim jurisdiction over the acts of another state is suspended by the outbreak of war, and consequently that it is not applicable to the relationship between belligerents ...

According to the learned Professor:

"If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an international court, the legal basis of the trial, as a rule, must be an international treaty concluded with the state whose acts shall be punished, by which treaty jurisdiction over individuals is conferred upon the national or international court. If it is a national court, then this court functions, at least indirectly as an international court."...

He is positive that:

"The law of a state contains no norms that attach sanctions

to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. The substantive law

applied by a national court competent to punish individuals for such acts can be international law only. Hence the international treaty must determine not only the delict but also the punishment, or must authorize the international court to fix the punishment which it considers to be adquate....." All that I need add to these observations of the learned author is that in the present case there has been no treaty of the kind contemplated by him as I have noticed already.

The learned author is clear in his view:

1. That for such acts as are alleged in this case, international law, by itself, does not make their individual authors criminally responsible.
2. That such acts do not constitute crime in any individual in international law as it now stands.
3. That a victor nation cannot, on the mere strength of conquest:
   (a) Make such acts criminal with retrospective effect;
   (b) Punish in law the individual authors of such acts.
4. That a victor nation may derive such authority by appropriate treaty from the state for which the individuals in question acted.

His summarization of the position after the Second World War does does not thus differ from the view expressed by Judge Manley O. Hudson.

Only Professor Kelsen thinks that with the help of an appropriate treaty such a trial and punishment would have been made legitimate. As I have already indicated above, this view of his may or may not be supportable on principle, and in my opinion, it is not. But so far as the present case is concerned it would suffice to say that there is no such treaty.

This view finds support in what Professor Glueck says in his treaties on "War Criminals, their Prosecution and Punishment" published in September 1944 after the Moscow Declaration of 1943 and after the learned Professor had served on the commission on the trial and punishment of War Criminals of the London International Assembly. In Chapter III of his book, the learned Professor defines "war criminals" as "persons -- regardless of military or political rank -- who, in connection with the military, political, economic or industrial preparation for or waging war, have, in their official capacity, committed acts contrary to (a) the laws and customs of legitimate warfare or (b) the principles of criminal law generally observed in civilized states; or who have incited, ordered, procured, counseled, or conspired in the commission of such acts; or, having knowledge that such acts were about to be committed, and possessing the duty and power to prevent them, have failed to do so."

We need not stop here to examine the correctness or otherwise of this definition with reference to the norms of international law. The learned author, after giving his definition, makes certain observations which will be pertinent for our present purpose. He says:

"Observe certain features of this definition. First, it is not intended to include the "crime" of flagrantly violating solemn treaty obligations or conducting a war of aggression. The Commission of Fifteen appointed by the Preliminary Peace Conference at the close of the World War I to examine the responsibility for starting that war and for atrocities committed during its conduct, found former Kaiser Wilhelm II and other high placed personages "guilty" of "gross outrages upon the law of nations and international good faith", but concluded that "no criminal charge" could be brought; although the outrages should be the subject of a formal condemnation by the Conference."

They emphasized it to be "desirable that for the future penal sanctions should be provided for such grave outrages against the elementar principles of international law". But throughout the quarter century between the two World Wars nothing has been done by the nations of the world to implement this recommendation. The Kellogg-Briand Pact, signed in Paris in 1928, condemned recourse to war for the solution of international controversies, renounced it as an instrument of national policy, and bound the signatories to seek the settlement of all disputes by pacific means only. But that Pact too failed to make violations of its terms an international crime punishable either by national courts or some international tribunal. Therefore, the legal basis for prosecutions for violations of the Pact of Paris may be open to question, though the moral grounds are crystal clear.

"Besides, to prosecute Axis leaders for the crime of having initiated an unjust war, or having violated the "sanctity of treaties", would only drag a red herring across the trail and confuse the much clearer principle of liability for atrocities committed during the conduct of a war, be it a just or an unjust one. The Germans would surely argue that the Allies had first violated the Treaty of Versailles in not disarming; and learned historians would insist, as they did at the close of World War I, that only lengthy historical and economic investigations could really fix responsibility for "causing" the war.

"For these reasons, the origination of an unjust war ought, for the present, not to be included among the acts triable as "war crimes", however desirable it would be to establish judicially the principles involved....."

Dr. Glueck, however, in a recent book published in 1946 and entitled "The Nuernberg Trial and Aggressive War" has expressed the opposite opinic The learned Professor in this new book says:

"During the preparation of my previous book on the subject of war crimes, I was not at all certain that the act of launching and conducting an aggressive war could be regarded as "international crime". I finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Kellogg-Briand Pact) signed in Paris in 1928. I was influenced also by the

question of policy . . . However, further reflection upon the problem has led me to the conclusion that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be acceptable as international law."

The learned Professor still says that "The case for prosecuting individuals and states for the 'crime' of launching an aggressive war is not as strong as the case for holding them responsible for violations of the recognized laws and customs of legitimate warfare". He, however, considers it "strong enough to support the relevant count in the Nuremberg Indictment".

The count in question stands thus:

"All the defendants, with divers other persons, during a period of years preceding 8th May 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances."

The revised opinion of the learned Professor is based on the following data in addition to those already given by me while considering his view that war became crime by an international customary law:

1. The United Nations could have executed the Nuremberg defendants without any judicial procedure whatsoever;

"summarily by executive or political action..... without any consideration whatsoever of whether the acts with which the accused were charged had or had not previously been prohibited by some specific provision of international penal law";

(a) The law of an armistice or a treaty is, in the final analysis, the will of the victor;

(b) Although duress may be a good ground for repudiation of an international contract entered into during a period of peaceful relationships between law-observing states, compulsion is to be expected and is an historic fact in the case of international agreements imposed by a victorious belligerent state upon the vanquished;

2. The Fact that the contracting parties to a treaty have agreed to render aggressive war illegal does not necessarily mean that they have decided to make its violation an international crime. Even a multi-national contract and one dealing with a subject so vital to the survival of nations as the Kellogg-Briand Pact is not a penal statute; and the remedy for breach of contract does not consist of prosecution and punishment of the guilty party, but rather of obtaining compensation for its breach.

3. (a) The Charter constituting the Tribunal gives dogmatically affirmative answers to the two following questions:

(i) Whether aggressive war can be denominated an international crime.

(ii) Whether individuals comprising the government or general staff of an aggressor state may be prosecuted as liable for such crime.

(b) There is no question but that, as an act of the will of the conqueror, the United Nations had the authority to frame and adopt such a Charter.

4. Assuming modern aggressive war to be a crime, i. e. an offense against the Family of Nations and its international law, then the defendant must normally be the implicated state.

(a) But, action against a state must necessarily be ineffective in reducing international criminalism, compared to the imposition of penal sanctions upon members of a cabinet, heads of a general staff, etc., who have led a state into aggressive war.

(i) There are sound reasons for the familiar application of the act-of-state doctrine to the normal, peaceful intercourse of nations, without it necessarily following that it is also to be applied to the situation presented by the acts of Nazi ringleaders . . .

(ii) An issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lend.

(iii) As Blackstone pointed out, a sovereign would not willingly ally himself with the criminal acts of his agents.

(iv) It is perfectly obvious that the application of a universal principle of non-responsibility of a state's agents could easily render the entire body of international law a dead letter.

(v) This is a doctrine contrary to reason and justice and it is high time the error were remedied . . . Since law is supposed to embody the rule

of reason in the interests of justice, and the unqualified act-of-state doctrine emasculates both reason and justice, it cannot be regarded as sound law.

5. Individuals are liable under international law in many instances; the relevant principles of the law of nations may and do obligate individuals.

of reason in the interests of justice, and the unqualified act-of-state doctrine emasculates both reason and justice, it cannot be regarded as sound law.

5. Individuals are liable under international law in many instances; the relevant principles of the law of nations may and do obligate individuals.

(a) The traditional view, that "individuals are not subjects of the law of nations", is open to question historically and in a practical sense: (The learned author cites the instances of piracy and the like.)

The two fundamental elements in Dr. Glueck's approach here are:

1. The unlimited power of the victor under international law;

2. The growth of the customary law in the international system.

If the learned Professor is correct in his first proposition, then there is no doubt that the United Nations can adopt any procedure for the exercise of this power, and, though quite unnecessary, may introduce a sort of definition of a crime covering the acts alleged to have been committed by the accused and on a finding of the constituent facts, thus specified, execute them. Dr. Glueck's authority for this proposition, as far as I could see, is the statement of Mr. Justice Jackson in his report to the President of the United States. I cannot accept this proposition either ratione imperii or imperio rationis. I have already expressed my own view of the question. In my opinion, the view taken by the learned author, as also by Mr. Justice Jackson, has no support in the modern system of International Law.

It may be that Dr. Glueck and Mr. Justice Jackson are thinking of the right of the belligerent to kill such persons during belligerency. But the right of killing ceases as soon as they are taken prisoners. From the date of their seizure they become entitled to the protection of the rule

that more than necessary violence must not be used.

The learned author cites the case of Napoleon and points out how the powers there declared that Napoleon had put himself outside "civil and social relations and that, as enemy and perpetrator of the world, he has incurred liability to public vengeance". Had the Allies followed the recommendation of the Prussian Field Marshal Blucher, Napoleon would then have been shot on sight as one who, under the above declaration, was an "outlaw".

I need not stop here to examine this view with reference to the provisions of International Law. It would be sufficient to say that International Law in this respect does not still stand where it might have been in those days and that the proclivities of the victors unhindered as they may be by the weaknesses of their adversary may reveal determinations that are uninfluenced by a sense of legal obligation; such determinations, however, should never be confused with law.

I believe Dr. Glueck did not ignore the fact that even in those days considerable doubts were entertained and difficulties, felt about the legality of the steps taken in respect of Napoleon. We may refer to Dr. Hale Bellot's article on "The Detention of Napoleon Bounaparte" published in the Law Quarterly Review Vol. XXXIX pp. 170 - 192.

The Prussian Project referred to by Dr. Glueck did not find favor with the Duke of Wellington. The Duke disputed the correctness of the Prussian interpretation of the Viennese declaration of outlawry and asserted that it was never meant to incite the assassination of Napoleon. According to the

Duke the victors did not acquire, from this act of outlawry, any right to order Napoleon to be shot.

Then, again, a considerable difficulty was felt about Napoleon's status. Napoleon himself never assented to the proposition that he was a Prisoner of War, and never claimed any rights as such. Before surrender, when arrangement for his escape on board a Danish vessel was completed, he refused to go and made up his mind to surrender to the British, saying, "There is always danger in confiding oneself to enemies, but it is better to take the risk of confiding in their honour than to fall into their hands as a prisoner according to law". After his surrender he repeatedly denied that he was a prisoner of war although he was aware of the rights of such a prisoner in international law. He professed to consider himself as a simple individual seeking asylum in Great Britain.

Apart from Napoleon's own view of his status, grave difficulties in this respect were felt by the then British authorities also. Legal opinion was sharply divided on the question. The first legal advice was that Bounaparte should be regarded as a rebel and surrendered to his Sovereign. This view was taken by the Master of the Rolls and was adopted by Lord Liverpool. Lord Ellenborough and Sir. W. Scott saw following alternative possibilities.

Either 1. He was a subject of France and Britain was at war with France

or 2. He was a French rebel and Britain was assisting the Sovereign of France as an ally.

The war had not yet been put to an end by any treaty.

Lord Ellenborough suggested that he should be regarded as an individual of the French nation, at war with Great Britain, and consequently in common with the French nation an enemy to Great Britain. He thought that it would be possible to exclude him from the benefit of a treaty of peace that might be made subsequently with the French nation. Sir William Scott could not agree with this view. According to him, Great Britain could surrender him to France as a rebel subject; but to Great Britain he was a Prisoner of War and there was a clear general rule of the law of nations, that peace with the Sovereign of a State was peace with all its subjects. Lord Eldon raised the question whether Bounaparte could in fact be considered as a French subject: Great Britain had not been at war with France as France. He said: "We have acted upon the notion that . . . we are justified by the law of nations in using force to prevent Bounaparte's being Governor of France - that we have made war upon him and his adherents - not as French enemies - not as French rebels - but as enemies to us and the allies when France was no enemy to us - that in this war with him, he has become a prisoner of war, with whom we can make no peace, because we can have no safety but in his imprisonment - no peace with him, or which includes him."

In the House of Lords, Lord Holland considered that the case involved inter alia the following questions:

1. Could any person be held as a prisoner of war, who was not the subject of any known state?
2. Could any man be detained who was the subject of a state with

whom we were not at war?

3. Whether any person could be considered as an alien enemy, who was not the subject of any state with which we were at war?

At the congress of Aix-la-Chapelle, 1818, the Protocal by which Napoleon's matter was brought before the congress described Bounaparte in 1815 as merely "the chief of a shapeless force, without recognized political character, and consequently, without any right to claim the advantages and the courtesies due public Power by civilized nations. . . Bounaparte, before the battle of Waterloo, was a dangerous rebel; after the defeat, an adventurer whose projects were betrayed by fate. . . . In this situation, his fate was submitted to the discretion of the governments which he had offended; and there existed then in his favour (with the exception of the rights inseparable from humanity) no positive law, no salutary maxim applicable to him . . .".

Certainly what happened to Napoleon cannot be cited as adding to or detracting from international law in any respect.

The regulations annexed to The Hague Convention No. 4 of 1907 respecting The Laws and Customs of War on Land, the Geneva (Prisoners of War) Convention of 1929, the War Rules of the several national states, especially the U.S. War Department Rules of Land Warfare of 1940, all point to a direction contrary to what Mr. Justice Jackson, and following him, Dr. Glueck, assert to be the legal position of a conqueror. Charles Cheney Hyde in his treatise on "International Law Chiefly as Interpreted and Applied by the United States" states: "According to the Instructions for the Government of the Armies of the United States in the Field", of

1863, and the Rules of Land Warfare of 1917, the Law of War disclaims all cruelty, as well as all acts of private revenge, or connivance at such acts, and all extortions. Nor does it allow proclaiming either an individual belonging to the hostile army or a citizen or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, "anymore than the modern law of peace allows such intentional outlawry; on the contrary it abhors such outrage".

The Hague Regulations expressly forbid a belligerent to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion, or to declare that no quarter will be given.

The Hague Convention No. 4 of 1907 no doubt does not apply except between the Contracting Powers and then only if all the belligerents are parties to this convention. But the regulations annexed to this convention purport to incorporate only the existing principles of the law of nations resulting from the usages established among civilized peoples.

As the law now stands, it will be a "war crime" stricto sensu on the part of the victor nations if they would "execute" these prisoners otherwise than under a due process of international law, though, of course, there may not be anyone to bring them to book for that crime at present.

Dr. Glueck takes the view that the Pact of Paris, itself, does not make its violation an international crime. His third proposition as given above, therefore, is only a corollary to his first proposition. The "dogmatically given affirmative answer" referred to in his third proposition

would not stand if his first proposition fails. In my view if the alleged acts do not constitute any crime under the existing international law, the trial and punishment of the authors thereof with a new definition of crime given by the victor would make it a "war crime" on his part. The prisoners are to be dealt with according to the rules and regulations of international law and not according to what the victor chooses to name as international law.

I need not stop here to examine the proposition regarding the law of armistice and treaty propounded by Dr. Glueck. For my present purposes it would be sufficient to notice, as I have noticed already, that there is nothing in the terms of the armistice or surrender here which would confer on the victor nations any such unfounded authority as is enunciated by Dr. Glueck. The international law, itself, does not vest in the victor any boundless authority.

Dr. Glueck in his fourth, fifth, and sixth propositions, as analyzed above, seeks to establish that "aggressive war" is an international crime not because it is made so by any pact, convention or treaty, but by what he calls the customary international law. In his seventh and eighth propositions he develops individual responsibility.

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At any rate the alleged "custom" or "customary law" does not touch the individuals. The body of growing custom to which reference is made is, at most, custom directed to sovereign states, not to individuals.

I believe, what Mr. Finch has said very recently about the individual criminal responsibility in international law while commenting on the Nuremberg judgment will supply an answer to Dr. Glueck's thesis. I would summarize what Mr. Finch says on the point. Mr. Finch says:

1. The charge of crimes against peace is a new international criminal concept.

   (a) (i) It was not envisaged in the warnings issued by the Allies before hostilities ended;

   (ii) nor made part of the original terms of reference to the United Nations War Crimes Commission established in London during the war;

   (iii) In Dr. Lachs' collection of texts there is an aide memoire of the British Government issued August 6, 1942, stating that "in dealing with war criminals, whatever the court, it should apply the laws already applicable and no special ad hoc law should be enacted."

   (b) It may be traced to the influence of Professor A. N. Trainin of the Institute of Law of the Moscow Academy of Science, who, in 1944, published a book entitled "Ugolovnaya Otvetstvennost Gitlerovtzev".

2. The crux of the argument by which it is sought to establish

personal responsibility for crimes against peace center around the Pact of Paris for the Renunciation of War.

(a) (i) The Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars.

(ii) Kellogg in the negotiations with France preceding the signature of the Pact definitely declined to accede to the French proposal that the Pact be limited to the renunciation of 'wars of aggression'.

(iii) According to him "from the broad standpoint of humanity and civilization, all war is an assault upon the stability of human society, and should be suppressed in the common interest."

(b) The Pact does not mention <u>sanctions</u> for its enforcement other than statement in the preamble that "any Signatory Power which shall hereafter seek to <u>promote</u> its national interests by resort to war should be denied the benefits furnished by this treaty."

(i) This provision is not imperative but conditional in the discretion of each signatory;

(ii) In identic notes submitting the draft treaty to the other signatories, Kellogg stated that the preamble "gives express recognition to the principle that if a state resorts to war in violation of the treaty, the

other contracting parties are released from their obligations under the treaty to that state."

(iii) Both by the preamble and Secretary of States' (Kellogg's) interpretation, any action which might result from a violation of the Pact was to be directed against the violating government.

(iv) Personal criminal responsibility was not stipulated nor even impliedly suggested.

(c) In the years immediately following its conclusion, the meaning of the Pact became the subject of discussion in other countries.

(i) When the British Government signed the optional clause of the statute of the Permanent Court of International Justice in 1929, it published a memorandum explaining its view of the position created by the acceptance of the Covenant of the League of Nations and the Pact of Paris:

According to this British Memorandum: "The effect of those instruments, taken together is to deprive nations of the right to employ war as an instrument of national policy, and to forbid States which have signed them to give aid or comfort to an offender. As between such states there has been in consequence a fundamental change in the whole question of belligerent and neutral rights."

(ii) Upon receipt of the British Memorandum, Mr. Stimson, the then Secretary of State made public a statement in which he denied that this British argument applied to the position of the United States as a Signatory of the Pact. "As has been pointed out many times," he emphasized, "the Pact contains no covenant similar to that in the covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it."

(d) In September 1934, the International Law Association in its meeting at Budapest, adopted articles of interpretation of the Pact. This interpretation of these distinguished international law experts does not contain the remotest suggestion of criminal action against individuals for the violation of the Pact.

(i) They expressed the view that in case of a violation the other signatories would be justified in modifying their obligations as neutral states so as to favour the victim of the aggression against the state making war in violation of the Pact.

(ii) This interpretation was relied upon in part in suppor of the modification of the attitude of the U.S. early

in 1941 (Lend Lease Act, March 11, 1941) from that of traditional neutrality to the furnishing of official aid to the countries whose defense was considered necessary to the defense of the U.S.

(iii) Earlier attempts made in the U.S. to implement the Pact of Paris by legislation which would have authorized the Government to discriminate between the belligerents in future war, all failed and resulted in the passage of more rigid laws to preserve the neutrality and peace of the United States.

(e) (i) In the light of the legislative history of the official attitude of the Government of the United States toward the interpretations of the Pact, from January 1933 to the passing of the Neutrality Pact of November 4, 1939, it is impossible to accept the thesis of the Nuremberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and that those who planned and engaged in it were guilty of international criminal acts at the time they were committed etc.

(ii) The Budapest articles of interpretation were cited in support of the Lend Lease legislation.

3. It requires an attenuated legal conceptualism to go further and deduce dehors the written instrument personal criminal liability for non-observance of the Pact never before conceived of in inter-

national law as attaching to violation of treaties regulating state conduct.

4. (a) It can not be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing.

(b) All such efforts deserve the utmost praise, sympathy and support.

(c) But unratified protocols cannot be cited to show acceptance of their provisions and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action; and treaties of non-aggression that are flagrantly disregarded when it becomes expedient to do so cannot be relied upon as evidence to prove the evolution of an international custom outlawing aggression.

Dr. Glueck, however, does not rely on any customary law in fixing the criminal responsibility on the individuals. He admits that the alleged customary law will only take us to the state concerned. He correctly says that if war is crime the criminal responsibility attaches to the state concerned. He however reaches the individuals by a process of reasoning which seems to indicate as if we must get hold of them anyhow. Individuals must be got hold of in order to make the responsibility effective. This he considers to be the realistic view in the light of the practical as well as logical result to which one or the other solution will lead.

Even keeping in view the very harsh reproaches to which one must subject himself if he is not prepared to share this view of Dr. Glueck, I am afraid, I cannot induce myself to this view of the law.

I cannot forget that so long as national sovereignty remains the fundamental basis of international relation, acts done while working a national constitution will remain unjusticiable in international system and individuals functioning in such capacities will remain outside the sphere of international law. I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the postwar organizations after this Second World War national sovereignty still figures very largely.

One great authority relied on by Dr. Glueck is the Right Honorable Lord Wright. His views are expressed in an article on "War Crimes Under International Law", published in the Law Quarterly Review in January 1946. After all, as daily experience shows, the success of a thought in every field of human activity including the legal field does not always depend exclusively upon its inner value but also upon certain outward circumstances, particularly upon the weight generally attached to the words of the person who has given utterance to the thought. I must say with due respect that Lord Wright's utterances deserve special weight on both these grounds and these must be examined very carefully before we can decide one way or the other. I would quote from Lord Wright's article at some length.

Lord Wright does not base his conclusion on any unlimited power of the victor. He is rather against the view that any judiciary should be instrumental to the mere manifestation of the victor's power, if the trial is to be such a manifestation only. His thesis is that such acts constitute crime in the individuals concerned under the international law.

Lord Wright says:

"War crimes are generally of a mass or multiple character. At one end are the devisers, organizers, originators, who would in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators; in between these extremes are the intermediate links in the chain of crime."

He then quotes from Professor Trainin's work on "Hitlerite Responsibility under the criminal law", where the learned Professor observes that all members of the Hitlerite clique were not only participants in an international band of criminals but also organizers of a countless number of criminal acts and concludes that "all the Hitlerite criminals are liable without exception from the lance-corporal in the Army to the lance-corporal on the throne". Accepting this view of Professor Trainin and referring to the several acts ascribed to the Hitlerite group, Lord Wright proceeds to observe: "A 'political' purpose does not change murder into something which is not murder. Nor do they cease to be crimes against the law of war because they are also crimes against the moral law or the elementary principles of right and wrong.

Law and morality do not necessarily coincide, though in an ideal world they ought to. But a crime does not cease to be a crime because it is also an offence against the moral code."

With "the above thought in mind" Lord Wright approaches the question "whether the initiation of war, the crime against peace, which the Agreement of the four Governments pillories, is a Crime calling for the punishment of individual criminals." He then proceeds to consider the question from two different viewpoints, namely:

1. That "the war was ushered in by the most brutal and blatant announcements that it would be conducted with every possible atrocity in order to strike terror"; and thus it became criminal;
2. That "even without the calculated system of terrorism" the war was criminal as it aimed at aggression and world domination.

Coming to the second aspect of his approach, Lord Wright says:

"But the category of crimes against peace which is one of the counts in the Indictment of 1945 and includes the planning, preparation and initiation of aggressive or unjust war, requires a short further discussion. It does raise one of the most debated questions of international law. I have stated why I think it is an international crime and indeed the master crime. It is the source and origin of all the evils of war - modern war, even without the calculated system of terrorism exhibited by the

Germans and their Allies in the war just ended, is about the greatest calamity which can be inflicted upon mankind. No one can doubt that to bring this about with cold, calculated villainy, for the purpose of spoliation and aggrandisement, is a moral crime of the foulest character."

Lord Wright then points out how legal writers are fond of distinguishing moral from legal crime, and says:

"There is, however, no logical distinction in the character of the act or its criminality; the only question is whether the crime can be punished on legal grounds, that is <u>whether the offence has achieved the status of being forbidden by law</u>."

He then proceeds:

"To punish without law is to exercise an act of power divorced from law. Every act of punishment involves an exercise of power, but if it is not based on law it may be morally just, but it is not a manifestation of justice according to law, though some seem to think that if the justice and morality of the decision are incontrovertible, it may serve as a precedent for similar acts in the future and thus establish a rule of International Law. Thus the banishment of Napoleon I to St. Helena by the executive action of the Allies may, according to that way of thinking, be taken in some sort to create a precedent for the similar executive action for the

punishment of deposed or of abdicated sovereigns. But the idea of an International Law between different members of the community of nations would not be thus developed."

Lord Wright then points out:

"The punishment of heads or other members of Governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a Court as a matter of International Law."

In this connection he also refers to the fact that:

"The 1919 Commission did not recommend that the act which brought about the war should be charged against their authors."

According to Lord Wright, however:

"between then and the commencement of the war just ended, civilized nations, appalled by reviewing the destruction and suffering caused by the First Great War and appalled by the thought of the immeasurable calamities which would flow from a Second World War, gave much thought to the possibility of preventing the second war. The Covenant of the League of Nations did contain certain machinery for that end. Certain conventions were summoned to declare that unjust or aggressive war was to be prohibited; one of these actually declared that it was a crime."

Lord Wright then considers the effect of the Pact of Paris in this respect and says:

"In 1928 the Pact or the Kellogg-Briand Pact was signed or adhered to by over sixty nations. It was a solemn treaty.

Its central operative clause was brief, unusually brief for an international document, but its terms were plain, clear and categorical. The nations who signed or adhered to it unconditionally renounced war for the future as an instrument of policy. There would seem to be no doubt or obscurity about the meaning of this..... There seems to be no room for doubt that the Pact was, as is clear by its very terms, intended to declare war to be an illegal thing: This which is plain enough on its face has been declared to be the fact by the most eminent statesmen of the world."

Lord Wright then seeks to explain away the want of any provision in the Pact with regard to sanctions and machinery for the settlement of differences between nations. He says:

"The concert of the nations evidenced by the Pact had the sanction of being embodied in a Treaty, the most formal testimony to its binding force. As a treaty or agreement it only bound the nations which were parties to it. But it may be regarded from a different aspect. It is evidence of the acceptance by the civilised nations of the principle that war is an illegal thing. This principle so accepted and evidenced, is entitled to rank as a rule of International Law."

So far the criminal responsibility is traced to the aggressive nation. The reasoning with which Lord Wright justifies fixation of responsibility on the individuals finds expression thus:

"It may be that before the Pact the principle was simply a rule of morality, a rule of natural as contrasted with positive law. The Pact, which is clear and specific, converts the moral rule into a positive rule comparable to the laws and customs of war, and like these laws and customs binding on individuals since the principle that individuals may be penally liable for particular breaches of International Law is now generally accepted. Thus violation of the principle that war, if unjust, is illegal and is not only a breach of

treaty on the part of the nation which violates it, carrying with it all the consequences which attend a treaty-breaking, but is also a crime on the part of the individuals who are guilty as conspirators, principals or accessories of actively bringing it about, as much as a violation of the customary laws of war. Nations can only act by responsible instruments, that is by persons. If a nation, in breach of a treaty, initiates aggressive war the guilt of the responsible agents of the nation who bring this about, being able to do so by reason of their high position in the State, is a separate, independent and different liability, both in its nature and penal consequences. This is merely an illustration of the thesis that international crimes are of a multiple character; even violations of the laws of war will, unless the case is one of purely individual wrong-doing, generally involve multiple penal liability. Here the nation breaks the treaty, but the heads of the State who bring about the war are by their acts personally guilty of doing what the Pact declares to be illegal. That is a crime on their part like the crime of violating the laws of war. The nation is liable as a treaty-breaker, the statesmen are liable as violating a rule of International Law, namely, the rule that unjust or aggressive war is an international crime. The Pact of Paris is not a scrap of paper. This, in my opinion, is the position when the

Pact of Paris is violated. It is on this principle, as I apprehend, that crimes against peace may be charged personally against the leading members of the Nazi Government."

Lord Wright's last appeal is to the progressive character of international law, already noticed by me.

The authorities such as I have referred to above or hereafter may have occasion to refer to are only of persuasive value to us and in spite of what I have said as to why a special weight is due to his view, I should at once say with due deference that for the reasons given below I do not feel inclined to the view supported by the Right Honorable Lord Wright.

The passages wherein Lord Wright quotes from Professor Trainin and concludes that however "high his rank in the hierarchy", a member of the Hitlerite clique "is still only a murderer, robber, torturer, debaucher of women, liar and so on", need not detain us long. These are mere expressions of indignation roused by the remembrance of recent abominable acts during war. It may not be possible for one to avoid such feeling who had to study the tale of Nazi atrocities. But such a feeling must be avoided by a Tribunal sitting on trial for such alleged acts.

Lord Wright approaches the question in two different ways. His first line of approach is dependent on a special factual feature of the case before him, namely, that the war in question was not only an aggressive war but that it was expressly designed to be conducted in a criminal manner -- it was ushered in by the most brutal and blatant announcements

that it would be conducted with every possible atrocity in order to strike terror. In my opinion, this fact, if established, would make these persons responsible for war crimes strictō sensu. Legal or illegal, war is to be regulated in accordance with the regulating norms of international law. Those who actually violate such regulations and those who direct their violations are equally war criminals strictō sensu. This line of approach, therefore, does not help us in answering the question raised before us.

In his second line of approach, Lord Wright takes up the case of war without the calculated system of terrorism and this is what we are concerned with for our present purpose.

So far as the question before us is concerned, Lord Wright's real reasons for declaring individual responsibility will be found to be the following:

1. In order that there may be international crime, there must be an international community.
   (a) There is a community of nations, though imperfect and inchoate;
   (b) The basic prescription of this community is the existence of peaceful relations between states.
2. War is a thing evil in itself: It breaks international peace.
   (a) It may be justified on some specified grounds;
   (b) A war of aggression falls outside that justification;
   (c) To initiate a war of aggression is therefore a crime.

premises

3. Granted the premises:

(a) That peace among nations is a desirable thing;

(b) That war is an evil in itself as it violates that peace;

(c) That there is a criminal international law affecting individuals;

It follows that individuals responsible for planning, preparing, starting and waging war are criminally liable under the international law.

4. Whatever might have been the legal position of war in an international community, the Pact of Paris or the Kellogg-Briand Pact of 1928 clearly declared it to be an illegal thing.

Reasons 1, 2, and 4, specified above, relate to the question whether aggressive war is at all a crime in international law. I have already considered that question and have answered it in the negative. The question now under our consideration is, assuming such a war to be a crime, what is the position of the individual state agents responsible for bringing about this war condition? Lord Wright touches this question only in his reason 3(c) as specified by me.

He, himself, points out that the punishment of heads or other members of governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a court as a matter of international law.

The cases of criminal international law affecting individuals referre

to by Lord Wright are also referred to and discussed by Judge Manley O. Hudson, Professor Glueck and Professor Hans Kelsen. Those are all cases where the act in question is the act of the individual on his own behalf committed on high seas or in connection with international property. Most of these cases are expressly provided for. I do not see how the existence of such international law helps the solution of the present question. It may be that even the present case could have been provided for, either in the several national systems or in international law. In fact, Senator Borah in 1927 placed a Resolution before the Senate to that effect. As has been pointed out by Professor Glueck, that has not been done by any of the nations for reasons best known to them. It may only be added here that during the period intervening between the two World Wars recommendations in this respect came from various unofficial bodies but all these seem to have gone unheeded by the several states.

Considering (1) that sovereignty of states has been the fundamental basis of hitherto existing international law; (2) that even in the post-war organizations this sovereignty is being taken as the fundamental basis; and (3) that so long as sovereignty of the states continues to play this important role, no state is likely to allow the working of its constitution to be made justiciable by any agency, I cannot hold that this omission on the part of the states in respect of the present question was not deliberate. I doubt if the states would even now agree to make such acts of their agents justiciable by others.

I have already given the view expressed by Prof. Quincy Wright in 1925. This is the place where I should notice what he now says while endeavouring to support the Nuremberg judgment. Prof. Wright says:

1. "The Tribunal reached the conclusion that the Charter declared pre-existing international law when ... it provided that individuals were liable for crimes against peace.
2. In coming to this conclusion the Tribunal emphasized the development of an international custom which regarded the initiation of aggressive war as illegal and which had been given formal sanction by substantially all the states in the Pact of Paris of 1928.
3. (a) The nexus between the obligation of states not to resort to aggressive war and the criminal liability of individuals who contribute to the violation of this obligation was illustrated by analogy to the generally recognized individual liability for War Crimes Strict Sensu.

   (b) If an individual act is of a criminal character, that is, mala in se, and is in violation of the states' international obligation, it is crime against the law of nations.

Professor Wright supports this view and for this purpose relies on the authority of Lord Wright, who, according to Prof. Wright, pointed out that the Pact of Paris converted the principle that "aggressive war is illegal" from a rule of "natural law" to a rule of "positive law", which like the rules of war is binding on individuals as well as states. I have already given my reasons why I could not accept this view of the effect of the Pact of Paris.

Lord Wright in arriving at his conclusion placed great reliance on the views of Mr. Trainin of the U.S.S.R. who with Mr. I. T. Nikitchenko signed the London agreement for the Government of the U.S.S.R. for the establishment of the International Tribunal for the trial of the major war criminals of the European Axis.

Mr. Trainin, it must be said, frankly points out the real urge for these trials. He says:

> "The question of the criminal responsibility of the Hitlerites for the crimes that they have committed is therefore of the greatest importance; it has become a very pressing problem, as the monstrous crimes of the Hitlerite butchers have aroused the most burning and unquenchable hatred, thirst for severe retribution in the hearts of all the honest people of the world, the masses of all liberty-loving people."

Mr. Trainin's article is entitled "The Criminal Responsibility of the Hitlerites". The learned author starts with the following propositions:

1. The problems of international criminal law have not hitherto been dealt with clearly.

(a) There is no clear definition of the fundamental meaning of international criminal law or international crime.

(b) No orderly system of institutes of international criminal law is recognized.

2. In the existing literature all problems of international criminal law usually boil down to one question -- that of jurisdiction.

(a) The policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations.

(1) But it would be a serious mistake to draw the general conclusion from this fact -- that the introduction of the problem of international criminal law was inopportune or fruitless.

(2) Two conflicting tendencies of the historical process had been visible even before the Second World War; namely:

(a) the collision of imperialistic interests,

the daily struggle in the field of international relations and the futility of international law -- the tendency reflecting the policy of the aggressive nations in the imperialistic era;

(b) the struggle for peace and liberty and independence of nations -- a tendency in which was reflected the policy of a new and powerful international factor.

3. The present great war has given the latter tendency extraordinary scope and enormous power.

(a) Liberty-loving nations have agreed that they respect the right of all nations to choose their own form of government and will strive to attain complete cooperation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security.

(b) The Declaration of the Four Nations on general security proclaimed in Moscow on October 30, 1943 replaced "the period of full play of imperialistic plundering, and of the weakness of international legal principles" by a period which strengthens the laws which are the basis of international relations and which consequently leads to the strengthening of

the battle against all the evil elements.

(c) That is why there is an indissoluble organic tie between the beginning of the creation of a new system of international legal relations and the fight against the Hitlerite crimes and against the international misdeeds of the aggressors.

4. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged:

(a) to forge the right form for these new relations;

(b) to work out a system of international law, and

(c) as an indissoluble part of this system to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundation of international relations.

Towards the end of the first chapter Mr. Trainin considers it to be "the most serious problem and the honourable obligation of the Soviet jurists to give legal expression to the demand for retribution for the crimes committed by the Hitlerites". He then proceeds in his second chapter to enumerate "German crimes in the First World War and the Treaty of Versailles".

In chapter three he takes up the discussion of "The Concept of International Crime". The learned author points out that though the War of 1914-1918 showed the great importance of the problem of the responsibility of the aggressor, juridical thought still continued to

wander in formal, unrealistic abstractions.

He points out that the problem in this respect is quite different in the field of international law from that in any national system. Here in the international field "there is no experience, no tradition, no prepared formulae of crime or punishment. This is a field in which criminal law is only beginning to penetrate, where the understanding of crime is only beginning to take form".

He then examines certain existing definitions and international conventions relating to certain crimes and rejects the definitions, observing that in them "the concept of an international offense as a particular kind of infringement upon sphere of international relations disappears completely, being dissolved in the mass of crimes provided against in national laws and committed on the territory of different states".

As regards the international conventions the learned Professor points out that 'the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives; the interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat, and other reasons of that nature". These do not help the solution of the problem now raised. "Because of their juristic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various

forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not connected directly with the problem of international crimes."

Mr. Trainin points out that such international conventions do not make these crimes international crime. Again, simply because there is no international convention relating to something that does not mean that this might not constitute international crime.

The learned author then takes up the League Conventions, and finds in them mere attempts at "classifying certain acts as criminal" and concludes that these also failed to "establish a concept of international crime.

He then proceeds to give his own views thus:

1. The conception of international crime and the combating of international crimes should be henceforth constructed on the basis:
   (a) Of experience of the "Fatherland Defense War".
   (b) On principles imbued with a real solicitude for the strengthening of the peaceful cooperation of the nations.
2. An international crime is an original and complex phenomenon. It differs in quality from the numerous crimes provided for by the national criminal legislations. Crimes in national systems are connected by one common basic

characteristic -- they are infringements upon social relations existing within a given country.

3. The epoch when governments and peoples lived isolated or practically isolated from each other is long past.
   (a) The capitalistic system specially developed complicated relations between nations.
      (1) A steady international association has developed.
      (2) Despite the conflicting interests of various nations, despite the differences in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value.

4. An international crime is an attempt against the above-mentioned achievement of human society -- an international crime is directed toward the deterioration, the hampering and the disruption of these connections.
   (a) An international crime should be defined as infringements on the bases of international association.

5. The legal regime of international relations rests on its own peculiar basic source of law, namely a treaty which is the only law-creating act.
   (a) It is wrong to say "that because the states accepted

for themselves, by voluntary agreements, the rules of their conduct, they themselves are also the final judges to decide if they can recognize these rules for a long time, or due to changed conditions, they will regulate in a new way the vital rights of the nation".

6. The rule that criminal law has no retroactive force can be provided against by the terms of a treaty. The treaty itself may supply the basis for the acknowledgment of the retroactive effect of such a rule of law.

In chapter four, the learned author gives a classification of international crimes. He begins by defining an international crime to be "a punishable infringement on the bases of international associations", classifies such crimes into two groups, the first group being "Interference with Peaceful Relations between Nations"; and the second, "Offenses connected with War". In the first group he places seven items, namely:

1. Acts of aggression;
2. Propaganda of aggression;
3. Conclusion of agreements with aggressive aims;
4. Violation of treaties which serve the cause of peace;
5. Provocation designed to disrupt peaceful relations between countries;

6. Terrorism;

7. Support of armed bands (Fifth Column).

According to him, with the exception of terrorism, none of the others are covered by international conventions.

Chapter five is devoted to "Crimes of the Hitlerites against Peace" and the learned author concludes his enumeration by saying that "the Hitlerites, having criminally exploded the world, transformed war into an elaborately thought out system executed according to plan, a system of militarized banditry".

In the next chapter he again enumerates "War Crimes of the Hitlerites" giving war crimes stricti sensu committed during the last war

In chapter seven, Mr. Trainin proceeds to find out "the perpetrator of an international crime". His propositions here seem to be the following:

1. The central problem in the sphere of criminal justice is the problem of guilt; there is no criminal responsibility without guilt. Guilt is expressed in two forms: In the form of intention and in the form of negligence.
2. A state as such cannot act with intention or negligence: This brings in the criminal exemption of a state.
3. For criminal acts committed in the name of the state or under its authority, the physical persons who represent the government and act in its name must bear the responsibility.

(a) The criminal responsibility of persons acting in the name of the state is natural under any form of government, but it is specially appropriate in Germany, ruled by tyranny.

(b) The criminal responsibility of physical persons acting on behalf of juridical persons is recognized in criminal legislations in force now. (e.g. Art 172 of the Swiss Criminal Code of 1937 making directors of a company criminally liable for some act of the company).

(c) The physical persons are criminally responsible because it is they who infringe the relations based on international law -- it does not matter that such individuals are no party in such international relations.

This is the whole thesis of Mr. Trainin. The remaining four chapters are not relevant for our present purpose.

Unlike the other authors named above, Mr. Trainin does not base his conclusion either on any pact or convention or on any customary law. He does not say that international law, as it stood before World War I, did contemplate such acts as criminal. It is not his case that any particular pact, including the Pact of Paris, made such acts criminal. He does not even claim that the criminality developed as a customary law. On the other hand, he seems to point out that it will be a false analogy

to rely on the cases of crimes hitherto recognized in international relations and, from such recognition, to attempt the introduction of the present crime.

It may sometimes be legitimate to apply the juristic concept of a legal proposition to phenomena which were not within the criminal contemplation of the proposition. But I doubt if it is legitimate to pour an altogether new content into such a proposition, a content which is not even approximately similar to its original content.

Mr. Trainin's thesis seems to be that since the Moscow Declaration of 1943 and as a result of the same, a new International Society has developed. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempt on the foundations of international relations.

Mr. Trainin speaks of some "honourable obligation" of the Soviet jurists to give legal expression to the demand of retribution for the crimes committed by the Hitlerites. I hope this sense of obligation to satisfy any demand of retribution did not weigh too much with him. A judge and a juridical thinker cannot function properly under the weight of such a feeling. Yet, it cannot be denied that Mr. Trainin's is a very valuable contribution to deep juridical thinking.

The rules of law, no doubt, to a great extent, flow from the facts

to which they apply. Yet an attempt to find such rules directly by such a consideration alone is likely to lead one to lose his way in a sort of labyrinth. The thecretical legal principles involved in this manner are not likely to stand the test of real life.

The Moscow Declaration is only a Declaration that a new epoch of international life is going to begin.

Even assuming that this new epoch has commenced, that will only mean the "reason" for the suggested law has come into existence. But the reason for the law is not, itself, the law.

The legal rule in question here is not such as would necessarily be implied in the state of facts related by Mr. Trainin and would thus originate simultaneously with those facts. International relations, even as promised by the Moscow Declaration, will still constitute a society in a very specific sense. It would be under the reign of law also in a specific sense, and, however much it may be desirable to have criminal law in such a life, such a law would not be its necessary implication.

At most, Mr. Trainin has only established a demand of the changing international life. But, I doubt whether this can be a genuine demand of that life and whether it can be effectively met by the introduction of such a criminal responsibility which would under the present organization only succeed in fixing such responsibility upon the parties to a lost War.

The learned author ignores the fact that even now national sovereignty continues to be the basic factor of international life and

that the acts in question affect the very essence of this sovereignty. So long as submission to any form of international life remains dependent on the volition of states, it is difficult to accept any mere implication of a pact or agreement which would so basically affect the very foundation of such sovereignty.

In any case, even assuming that such a criminal law flows naturally from mere reason, it is difficult to see how it is carried back to the past.

If Mr. Trainin is thinking of any treaty eliminating this difficulty as to retroactivity, it would suffice to say, as I have said already, that in the case before us there is no such treaty.

The most valuable contribution of Mr. Trainin in this respect is his view of the place of criminal responsibility in international life. He rightly points out that piracy, slavery and the like that have hitherto been included in international system as crimes cognizable by international law are really not international crimes in the correct sense of the term. He points out that "In reality, the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crimes, but by various political motives: The interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat and other reasons of that nature.....Because of their juristic nature and because of their factual significance, conventions for certain

common criminal offenses appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not a loss of practical attributes, but it is not connected directly with the problem of international crimes."

Mr. Trainin points out that the conception of criminal responsibility in international life can arise only when that life itself reaches a certain stage in its development. Before we can introduce this conception there, we must be in a position to say that that life itself is established on some peaceful basis: International crime will be an infringement of that base -- a breach or violation of the peace or pax of the international community.

I fully agree with Mr. Trainin in this view. What I find difficult to accept is his meaning of the term "peace" in this context; as also his view of the nature of the international community as it stood

before the Second World War. Further, I doubt if it would at all be expedient to introduce such criminal responsibility in international life.

The question of introduction of the conception of crime in international life requires to be examined from the viewpoint of the social utility of punishment. At one time and another different theories justifying punishment have been accepted for the purpose of national systems. These theories may be described as (1) Reformatory, (2) Deterrent, (3) Retributive and (4) Preventive. "Punishment has been credited with reforming the criminal into a law-abiding person, deterring others from committing the crime for which previous individuals were punished, making certain that retribution would be fair and judicious, rather than in the nature of private revenge, and enhancing the solidarity of the group by the collective expression if its disapproval of the law-breaker." Contemporary criminologists give short shrift to these arguments. I would however proceed on the footing that punishment can produce one or the other of the desired results.

So long as the international organization continues at the stage where the trial and punishment for any crime remains available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and the preventive effects.

The risk of criminal responsibility incurred in planning an aggressive war does not in the least become graver than that involved in the possible defeat in the war planned.

I do not think anyone would seriously think of reformation in this respect through the introduction of such a conception of criminal responsibility in international life. Moral attitudes and norms of conduct are acquired in too subtle a manner for punishment to be a reliable incentive even where such conduct relates to one's own individual interest. Even a slight knowledge of the processes of personality-development should warn us against the old doctrine of original sin in a new guise. If this is so, even when a person acts for his own individual purposes, it is needless to say that when the conduct in question relates, at least in the opinion of the individual concerned, to his national cause, the punishment meted out, or, criminal responsibility imposed by, the victor nation can produce very little effect. Fear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of the values behind that norm.

In any event, this theory of reformation, in international life, need not take the criminal responsibility beyond the State concerned. The theory proceeds on this footing. If a person does a wrong to another, he does it from an exaggeration of his own personality, and this aggressiveness must be restrained and the person made to realize that his desires do not rule the world, but that the interests of the community are determinative. Hence, punishment is designed to be the influence brought to bear on the person in order to bring to his consciousness the

conditionality of his existence, and to keep it within its limits. This is done by the infliction of such suffering as would cure the delinquent of his individualistic excess. For this purpose, an offending State itself can be effectively punished. Indeed the punishment can be effective only if the delinquent State as such is punished.

In my opinion it is inappropriate to introduce criminal responsibility of the agents of a state in international life for the purpose of retribution. Retribution, in the proper sense of the term, means the bringing home to the criminal the legitimate consequences of his conduct legitimate from the ethical standpoint. This would involve the determination of the degree of his moral responsibility, a task that is an impossibility for any legal Tribunal even in national life. Conditions of knowledge, of training, of opportunities for moral development, of social environment generally and of motive fall to be searched out even in justifying criminal responsibility on this ground in national life. In international life many other factors would fall to be considered before one can justify criminal responsibility on this retributive theory.

The only justification that remains for the introduction of such a conception in international life is revenge, a justification which all those who are demanding this trial are disclaiming.

It may be contended that indignation at a wrong done is a righteous feeling and that that feeling itself justifies the criminal law.

It is perhaps right that we should feel a certain satisfaction and recognize a certain fitness in the suffering of one who has done an

international wrong. It may even be morally obligatory upon us to feel indignant at a wrong done.

But it would be going too far to say that a demand for the gratification of this feeling of revenge alone would justify a criminal law. In national systems a criminal law, while satisfying this feeling of revenge, is calculated to do something more of real ethical value and that is the real justification of the law. Though vengeance might be the seed out of which criminal justice has grown, the paramount object of such is the prevention of offenses by the menace of law.

The mere feeling of vengeance is not of any ethical value. It is not right that we should wish evil to the offender unless it has the possibility of yielding any good. Two wholly distinct feelings require consideration in this connection. The one is a feeling of moral revulsion and is directed against the crime. The other is a desire for vengeance and is directed against the criminal. To revenge oneself is, in truth, but to add another evil to that which has already been done, and the admission of it as a right is, in effect, a negation of all civil and social order, for thereby are justified acts of violence not regulated by nor exercised with reference to, the social good. There are few who in modern times assert the abstract rightfulness of a desire for vengeance.

I am not unmindful of the view expressed by Fitzjames Stephen wherein he asserts the rightfulness of vengeance. "The infliction of punishment by law", says Stephen, "gives definite expression and a solemn

ratification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular, as distinguished from the conscientious, sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I think it is highly desirable", he continues, "that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

Though apparently this seems to indicate as if Stephens defends the desire for vengeance as ethically proper, on a careful examination of the thought thus expressed by him it would be found that what he really has in mind is that feeling of indignation which we justly feel at the commission of a wrong rather than the feeling of revenge pure and simple. If from his thought the belief in the possible educative or preventive value of the punishment is eliminated then the sentiment hardly justifies the law. Indignation arises on the commission of the wrong act. The justification of the law is its preventive capacity. If in an organization this prevention is not at all possible, the justification for its introduction there is absent: The organization is inapt for the introduction of criminal punishment.

In the feeling of indignation, the element that really matters much for the community is the expression of disapprobation. This disapproving feeling prevails primarily against the act; but of necessity it extends also to its author. The question is what is the possible and proper method of expressing this disapproval! In my opinion at the present stage of the international society, the method that would necessarily depend on the contingency of a war being lost, and that would be available only against the vanquished, is not what can be justified on any ethical ground. There are other available methods of giving expression to this disapprobation and in the present stage those other methods of expressing world opinion should satisfy the international community.

According to Mr. Trainin, before the present World War, "The policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations."

"But", Mr. Trainin says, "it would be a serious mistake to draw the general conclusion from this fact that the introduction of the problem of international criminal law was inopportune or fruitless: This would be to disregard the difficulty and complexity of international relations.

According to him even before the Second World War there were two "tendencies of the historical process", -- one being the collision of

imperialistic interests, the daily struggle in the field of international relations and the futility of international law -- the tendency reflecting the policy of the aggressive nations in the imperialistic era -- and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, a tendency in which is reflected the policy of a <u>new</u> and <u>powerful</u> international factor -- the Socialist State of the toilers, the U.S.S.R.

Thus there was some scope for the introduction of the conception of criminal law in international life in view of the second tendency named above.

This tendency, says Mr. Trainin, has been given extraordinary scope and enormous power by the Second War. The nations have now agreed that they "respect the right of <u>all</u> nations to choose their own form of government and will strive to attain complete cooperation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security". He refers to the Moscow Declaration of October 30, 1943 as having confirmed this solemnly. It is not very clear, but it seems that Mr. Trainin takes this solemn resolve on the part of the great powers as establishing the <u>base</u> of the international life and consequently as supplying the basis of criminality in the international system. He says: "Just as earlier, in the period of full play of imperialistic plundering, the weakness of international legal principles hindered the development of a system of measures to prevent the violation of international law,

now, on the contrary, the strengthening of the laws which are the basis of international relations must consequently lead to the strengthening of the battle against all the elements which dare, through fraud, terror or insane ideas upset international legal order".

It seems Mr. Trainin here takes the Moscow Declaration as establishing an international association completely under the reign of law and consequently making any breach of its peace criminal. In this view all wars will be crime unless they can be justified on the strength of the right of private defense as in the national systems.

In another place Mr. Trainin gives credit to the capitalistic system as developing complicated relations between individual nations. From this, according to him, a steady international association has developed. "Despite the conflicting interests of various nations, despite the difference in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic political and cultural value." An international crime, according to Mr. Trainin, is an attempt against the association between countries, between peoples, against the connections which constitute the basis of relations between nations and countries. An international crime is said to be one which is directed toward the deterioration, the hampering and the disruption of these connections.

I have elsewhere given my view of the character of the so-called international community as it stood on the eve of the Second World War.

It was simply a co-ordinated body of several independent sovereign units and certainly was not a body of which the order or security could be said to have been provided by law.

By saying this, I do not mean to suggest any absolute negation of international law. It is not my suggestion that the observance of the rules of international law, so far as these go, is not a matter of obligation. These rules might have resulted from the calculation that their observance was not incompatible with the interest of the state. Yet, their observance need not be characterized as the result of such calculation. A state before being a willing party to a rule, might have willed thus on the basis of some such calculation, but after contribution of its "will", which is essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created: The rule thus exists independently of the will of the parties: It is of no consequence that in coming into existence it had to depend on such will. Yet, simply because the several states are thus subjected to certain obligatory rules, it does not follow that the states have formed a community under a reign of law. Its order or security is not yet provided by law. Peace in such a community is only a negative concept -- it is simply a negation of war, or an assurance of the status quo. Even now each state is left to perform for itself the distributive function. The basis of international relations is still the competitive struggle of states, a struggle for the solution of which there is still no judge,

no executor, no standard of decision. There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful readjustment without struggle. It is left to the nations themselves to see to the readjustment.

Even a pact or a covenant which purports to bind the parties not to seek a solution of their disputes by other than pacific means, contains no specific obligation to submit controversies to any binding settlement, judicial or otherwise. It is a recognized rule of international life that in the absence of an agreement to the contrary, no state is bound to submit its disputes with another state to a binding judicial decision or to a method of settlement resulting in a solution binding upon both parties. This is a fundamental gap in the international system. War alone was designed to fill this gap -- war as a legitimate instrument of self-help against an international wrong, as also as an act of national sovereignty for the purpose of changing existing rights independently of the objective merits of the attempted change. Even when a pact is made to renounce war the gap is left almost unobserved and certainly unprovided for. <u>The basis of a society so designed is not that peace which means public order or security as provided by law and of which an infringement becomes a crime</u>. For a community thus designed, the conception of crime is still premature.

The most ingenious of the reasons that were given for fixing the criminal responsibility on the accused is that thereby the character of the whole defeated nation will be amply vindicated, and this will help the promotion of better understanding and good feeling between the individual citizens of the defeated and of the victor states. The entire defeated nation, it is said, has, by the war, provoked the hatred of the peace-loving nations. By the trial and punishment of these few persons who were really responsible for the war, the world will know that the defeated nation like all other nations was equally sinned against by these warlords. This will be a real and substantial contribution to the future peace of the world by repelling from the minds of the peace-loving nations all hatred towards the defeated nation and replacing such hatred with sympathy and good feeling. Assuming it to be so, I do not see how this coveted object would justify the punishment of these individuals by a court of law. If such is the object of a trial like the present, the same result could easily have been achieved by a commission of enquiry for war responsibility. Such a commission might have been manned by competent judges from different nationalities and their declaration would have produced the desired effect without any unnecessary straining of the law.

After giving my anxious and careful consideration to the reasons given by the prosecution as also to the opinions of the various authorities I have arrived at the conclusion:

1. That no category of war became criminal or illegal in international life;
2. That the individuals comprising the government and functioning as agents of that government incur no criminal responsibility in international law for the acts alleged;
3. That the international community has not as yet reached a stage which would make it expedient to include judicial process for condemning and punishing either states or individuals.

I have not said anything about the alleged object of the Japanese plan or conspiracy. I believe no one will seriously contend that domination of one nation by another became a crime in international life. Apart from the question of legality or otherwise of the means designed to achieve this object it must be held that the object itself was not yet illegal or criminal in international life. In any other view, the entire international community would be a community of criminal races. At least many of the powerful nations are living this sort of life and if these acts are criminal then the entire international community is living that criminal life, some actually committing the crime and others

becoming accessories after the fact in these crimes. No nation has as yet treated such acts as crimes and all the powerful nations continue close relations with the nations that had committed such acts.

Questions of law are not decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are retained and all else is forcibly excluded. We cannot afford to be ignorant of the world in which disputes arise.

Mr. Trainin's hopes are based on the Moscow Declaration of 1943 whereby, according to him, the nations have <u>now</u> agreed that they "respect the right of <u>all</u> nations to choose their own form of government". His hopes, however, are not yet realized in actual life and certainly <u>before</u> the Second World War, during the period we are here concerned with, the tendency reflecting the policy of the powerful nations did not even offer any scope for such a hope.

In the circumstances I would prefer the view that at least before the Second World War international law did not develop so as to make these acts criminal or illegal.